SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 31

THE UNITED STATES OF AMERICA, PETITIONER

vs.

F. H. REILY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA.

Pleas and Proceedings before the Honorable Colin Neblett, Judge of the United States District Court for the District of New Mexico, sitting by assignment in the Western District of Oklahoma, and presiding in the following-entitled cause:

UNITED STATES OF AMERICA, Plaintiff,

vs. #1192 Equity.

F. H. REILY, Defendant,

Bill of Complaint.

Comes now the plaintiff, the United States of America, by Roy St. Lewis, United States Attorney for the Western District of Oklahoma, and William Earl Wiles, Assistant United States Attorney for the Western District of Oklahoma, acting at the request of the Secretary of the Interior and by direction of the Attorney General and brings this bill of complaint herein against F. H. Reily and respectfully represents:

1.

That the defendant is a citizen and a resident of Shawnee, Pottawatomie County, in the Western District of Oklahoma; that the plaintiff now is, and at all times herein mentioned was the owner of the West half of the Northeast quarter (W½NE¼) of Section Nine (9), in Township Ten (10) North of Range Three (3) East of the Indian Meridian, containing eighty (80) acres in Pottawatomie County, Oklahoma, held in trust under and by virtue of treaties and agreements with the Kickapoo Tribe of Indians in Oklahoma, and acts of Congress, for the sole use and benefit of the heirs of Wahpuck-we-che, deceased, allottee #225 of the Mexican Kickapoo Tribe of Indians, of and for whom Charles Eggers is a duly

qualified and acting Superintendent and agent of the United States.

2.

This bill of complaint is brought to restrain the said defendant, his agents, servants, employees and all other persons whose names are unknown to plaintiff, working under or for said defendant, from further interferring with the leasing and managing of Indian lands held in trust by the United States and from further trespassing thereon.

3.

Plaintiff further shows to the Court that on the 18th day of October, 1930, by and through said Superintendent, plaintiff by its lease in writing #6720, duly and regularly leased said lands, for one year commencing January 1st, 1931, and ending December 31, 1931, excepting twelve acres thereof, to Jake F. Craig and the said lessee thereupon put into and now is in possession thereof; that said lessee has paid all rentals due on said lease and is farming said lands and will farm the same for spring crops according to said leasing.

4.

Plaintiff further shows to the Court that the defendant, F. H. Reily, thereafter on the ..... day of ....., 1930, filed in the District Court of Pottawatomie County, Oklahoma, his certain pretended suit for an injunction, and against said J. T. Craig, Charles Eggers and Charles D. Edmeister, being said plaintiff's lessee, Superintendent and district farmer, respectively, and seeking to enjoin each of them from exercising any right, leasing management or possession as heretofore set out of a part of said lands, to-wit: the West one-half of the West one-half of said Northeast Quarter as heretofore described; that on the 27th day of December, 1930, said District Court upon a further hearing of said pretended suit of defendant pretended to issue and make a permanent injunction therein against said lessee, Superintendent and District farmer from going upon or interferring with defendants pretended possession or control of said part of said land, and further in said order pretended to confirm title thereto in said defendant; that said defendant thereafter on the 10th day of January, 1931, filed in said pretended suit

his certain application to have said lessee, J. T. Craig, cited before said District Court for contempt proceedings for pretended interference with said defendants pretended right to possession of a part of said lands in pretended violation of said pretended permanent injunction, and said hearing set for the 24th day of January, 1931, before said Court; that thereafter on the 18th day of January, 1931, said defendant unlawfully entered and is now wilfully and wantonly trespassing upon said lands above mentioned; that all said proceedings of defendant and said orders and injunctions are each null and void because the plaintiff is the owner of said lands and holding the same in trust as aforesaid, and each are a wrongful and unlawful interference with plaintiff's leasing and managing said lands, and is interfering with the United States of America in carrying out the terms of said treaties and agreements with said Indians and said Acts of Congress and the due performance of its trust duties as aforesaid, and unless said defendant is restrained will be unable to do so.

11

5.

The plaintiff is without adequate remedy in the premises to prevent such unlawful act by the defendant, F. H. Reily, and other persons associated with him, except in a court of equity and by the immediate restraining orders and subsequent injunctions and decrees of this Court;

Wherefore, plaintiff prays that a writ of subpoena issue directed to F. H. Reily, commanding him to appear herein and answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as the Court may make in the premises;

That the Court upon final hearing of this suit, issue its permanent injunction against the defendant and all persons associated with him in all respects as above specified;

That plaintiff have such other further and general relief as the nature of the case may require and the Court may deem proper in the premises.

ROY ST. LEWIS,
United States Attorney.

WILLIAM EARL WILES,
Assistant United States Attorney.

State of Oklahoma, County of Oklahoma—ss.

William Earl Wiles, after being duly sworn upon
12 oath states, that he has read the foregoing bill and knows the contents thereof and that he verily believes the things contained therein are true.

WILLIAM EARL WILES.

Subscribed and sworn to before me this 21 day of January, 1931. (Seal) Glenn H. Grubb, Deputy Clerk U. S. District Court, Western District of Oklahoma.

Endorsed: Filed in District Court on Jan. 21, 1931.

Temporary Restraining Order.

And now on this 21 day of January, 1931, at 10 A.
13 M. this cause coming on to be heard on the motion of the plaintiff, for a temporary restraining order as prayed in said bill and plaintiff having exhibited the sworn bill to the Honorable Edgar S. Vaught, Judge of the United States District Court for the Western District of Oklahoma and the Court being fully advised in the premises and having heard read said bill:

It is ordered that a temporary restraining order issue out of this Court, commanding the said F. H. Reily from entering and trespassing on the Indian lands held in trust by the United States of America, more particularly described as the West one-half of the Northeast quarter of Section Nine (9) in Township Ten (10) North of Range Three (3) East, I. M., and particularly the West one-half thereof and also restraining the said defendant from cutting any inclosures situated on said property above described or plowing or committing any waste thereon and from aiding or abetting the doing of any such acts or things.

It is further ordered that the aforesaid temporary restraining order shall be full and binding upon said defendant named herein, from and after the service of this writ, by delivering a copy of this writ or by reading the same to him, and the service upon him respectively of the writ of subpoena herein.

It is further ordered that this cause be set down for hearing upon the application for a temporary injunction on the

31st day of January, 1931, 9 o'clock A. M. at the United States District Court room, Oklahoma City, Oklahoma, and the said defendant is hereby notified of said hearing and this temporary restraining order shall remain in full force and effect until said hearing and further order of this Court.

EDGAR S. VAUGHT, Judge.

United States Marshal's Return.

Received this writ at Oklahoma City January 23rd,
14 and executed same as follows, to-wit: By leaving a true copy of this writ with the within named F. H. *Riley* in person at Oklahoma City, January 23rd, 1931.

All done as within I am commanded.

RICHARD B. QUINN, U. S. Marshal,
By J. S. SMITH, Deputy.

Endorsed: Filed in District Court on Jan. 23, 1931.

Chancery Subpoena.

United States of America, Western District of Oklahoma—ss.

District Court of the United States of America, to F. H. Reily, Shawnee, Oklahoma, Greeting:

This is to command you and every of you, that you
15 appear before the Judge of the District Court of the United States of America for the Western District of Oklahoma, at the City of Oklahoma City, in said District, to answer the Bill of Complaint of United States of America, this day filed in the Clerk's office of said Court in said City of Oklahoma City to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Western District of Oklahoma to Execute:

Witness, The Hon. Edgar S. Vaught, Judge of the District Court of the United States of America for the Western District of Oklahoma, at the City of Oklahoma City, in said

District, this 21st day of January, in the year of our Lord one thousand nine hundred and thirty-one.

THEODORE M. FILSON, Clerk.
By EULA LEE GREEVER, Deputy Clerk.

Memorandum.

The above-named defendant is notified that unless he files his answer or other defense in the Clerk's office of said Court, at the City of Oklahoma City aforesaid, on or before the twentieth day after service of the above writ (excluding the day of service), the Bill of Complaint may be taken pro confesso and a decree entered accordingly.

THEODORE M. FILSON, Clerk.
By EULA LEE GREEVER, Deputy Clerk.

U. S. Marshal's Return.

United States of America, Western District of Oklahoma—ss.

Received the within writ January the 23rd, 1931, and
16 executed the same by leaving a true copy of this writ with the within named F. H. *Riley* in person at Oklahoma City, Jan. 23, 1931.

RICHARD B. QUINN,
By J. S. SMITH, Deputy.

Endorsed: Filed Jan. 23, 1931. Theodore M. Filson, Clerk, By Eula Lee Greever, Deputy.

Answer and Motion to Dismiss.

Comes now F. H. Reily, defendant in the above
17 entitled cause, and for his answer and motion to dismiss said cause, and alleges as follows, to-wit:

1. That said defendant, reserving the right to object to the jurisdiction of the Court, denies all of the allegations set forth in paragraph one of said Bill of Complaint, except that the defendant admits that Wah-puck-we-che was a Mexican-Kickapoo Indian, and was allotted, by the United States Government, the West One-Half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10) North, Range Three (3) East, and he admits that Charles Eggers is Superintendent as alleged.

2. This defendant denies the right or authority, as alleged in paragraph three of said Bill of Complaint, of the plaintiff or any of its agents, to lease said land.

3. This defendant further shows that he did file, in the District Court of Pottawatomie County, a suit against the said J. T. Craig, Charles Eggers and Charles W. Edmeister, and did obtain a permanent injunction against them and each of them, from intererring with the defendant in his possession of the West One-Half (W½ of the West One-Half (W½) of said eighty (80) acres of land and that he admits the said defendants violated said injunction and that he caused a citation to be issued and served upon said J. T. Craig for violation of said injunction.

4. Further answering herein, said defendant shows
18 to the Court that is has no jurisdiction of this cause and cannot entertain this action for the following reasons, to-wit: That the said Wah-puck-we-che, the original allottee herein, prior to, the Act of The Congress, dated the 21st day of June, 1906, became a resident of the Republic of Mexico and took up her permanent residence in the said Republic of Mexico and lived there continuously until her death. That she died some time prior to the 20th day of May, 1930, the exact time this defendant cannot state. That while she was a resident of the Republic of Mexico, she affiliated with the Mexican-Kickapoo Indians as a member of said tribe.

This defendant further says that about the same time the said Wah-puck-we-che became a non-resident of the United States of America and established her residence in the Republic of Mexico, that the said Wa-pe-com-e also established his residence in the Republic of Mexico and became a citizen thereof. That the said Wa-pe-com-e was a member of the Mexican-Kickapoo Indian Tribe and that he also affiliated with said Tribe in the Republic of Mexico, and was a member thereof. That he was allotted, under certificate No. 42, the West One-half (W½) of the Southwest Quarter of Section Fourteen (14), Township Twelve (12), Range One (1) East, in Oklahoma County. That the said Wa-pe-com-e is about forty to forty-five years of age, and is an adult Indian. That the said Wa-pe-com-e was, and is, the sole and only heir of the said Wah-puck-we-che, deceased, and that no other per-

son or persons are, or were, interested in the estate of the said Wah-puck-we-che, or any of the lands that were allotted to her by the United States Government.

This defendant further says that on the 20th day of May, 1930, the said Wa-pe-com-e, joined by his wife Sah-nah-ka-moquah, for a good and valuable consideration, made, executed and delivered to this defendant, as the sole heir of Wah-puck-we-che, deceased, their Warranty Deed to the West One-half (W½) of the West One-half (W½) of the Northeast Quarter of Section Nine (9), Township Ten (10) North, Range Three (3) East, and that by reason of the execution of said deed the said defendant became, and is, the owner of said land and entitled to possession thereof, and the United States Government no longer, under and by virtue of the Act of June 21, 1906, had or held any jurisdiction over said land, and said land became unrestricted and by reason of the premises this court has no jurisdiction over said land or of this action.

5. This defendant further says that he filed an action in the Superior Court of Pottawatomie County, Oklahoma, a court of general jurisdiction, against the said Wa-pe-com-e and his said wife, same being No. 6589, and that due and legal service was obtained upon the said Wa-pe-com-e and his said wife, and that on the 20th day of December, 1930, the court, after due and full hearing, rendered a judgment in said cause, decreeing that this plaintiff was the owner of said land and found that said land was unrestricted and that the said Wa-pe-com-e had a good right to convey said land and quieted the title in this defendant.

That a copy of the warranty deed referred to above is hereto attached, marked Exhibit A and made a part hereof. A copy of the Journal Entry of Judgment is also hereto attached, marked Exhibit B and made a part hereof.

6. This defendant further says that the Honorable the Secretary of the Interior, by departmental construction, on January 6, 1926, held that land allotted to deceased members of tribes and Indians named in the Act of June 21, 1906, was unrestricted where the heir or heirs were adult members of said tribe and had been allotted land in their own right, in the following language:

"As to the removal of restrictions from inherited land it (meaning the United States Circuit Court) indicated that three things were necessary. First, that the deceased allottee was a member of the Tribes named in the Act. Second, that the heir was also an adult member; and third, that he had been allotted land in his own right."

The Honorable the Secretary of the Interior also stated in said communication under the ruling of the United States Circuit Court of Appeals that the restrictions were removed from land under such circumstances and this defendant says that under said departmental construction and under and by virtue of the law that the United States Government has no further jurisdiction over said land and that the title conveyed to him by the said Wa-pe-com-e, was a valid and legal title and that the judgment of the Superior Court of Pottawatomie County is final, conclusive and binding upon the said Wa-pe-com-e and the United States Government and that by reason of the facts and circumstances this Court has no jurisdiction over said land or over this defendant and that the said cause should be in all things dismissed, and the prayer of the complaint be denied.

7. This defendant further says that at the time he purchased said land that two members of the Tribe of Mexican Kickapoo Indians, to-wit, Tom Johnson and Ma-ka-se-ah, made, executed and delivered to him their affidavit, in writing, which was filed for record May 20, 1930, in Book 138 of the Miscellaneous Records of Pottawatomie County, at page 353. That this affidavit was made in the presence and hearing of the said Wa-pe-com-e and that said affidavit shows that they were well-acquainted with Wa-pe-com-e and his wife and with Wah-puck-we-che, and that in said affidavit it was shown that Wah-puck-we-che was a resident, at the time of her death, of the Republic of Mexico and that the said Wa-pe-com-e established his residence in the Republic of Mexico in the year 1906 and resided there continuously for a period of ten years and that he was the sole surviving heir of the said Wah-puck-we-che.

That a copy of said affidavit is hereto attached, marked Exhibit C and made a part hereof.

That on the 6th day of December, 1930, the said Tom Johnson and Ma-ka-se-ah, in the presence of a Notary Public, made a statement under oath, setting out all the facts and
21 circumstances in connection with the said Wah-puck-we-che and showing that she is dead and that she was allotted the above described land and showing that Wa-pe-com-e was her sole surviving heir. And further showing that she affiliated with the Mexican-Kickapoo Tribe of Indians while in Mexico and that she made a will in which she designated Wa-pe-com-e as her sole heir.

That a copy of said statement is hereto attached, marked Exhibit D and made a part hereof.

That this affidavit and these statements are attached to this Answer and Motion for the purpose of advising the court in this hearing of the exact status of these Indians and the right of Wa-pe-com-e to convey said land as hereinbefore set forth.

8. Defendant further says that all the matters and things concurred together that would confer upon the said Wa-pe-com-e the right to convey said land to this defendant under the departmental construction of said Act as aforesaid, and under the construction placed upon said Act by the United States Circuit Court of Appeals, and that by reason of the premises this Honorable Court should hold that said land was unrestricted and that the Court has no jurisdiction over same and the United States Government and its agents, and especially the Secretary of the Interior and the Commissioner of Indian Affairs, have no jurisdiction over said land and said cause should be in all things dismissed at the cost of the plaintiff.

Wherefore, having answered fully herein, this defendant prays that it be determined by this Court that the United States Government has no jurisdiction over said land and the same is unrestricted and that the said Wa-pe-com-e had good right to convey said land to this defendant and that the judgment rendered in the Superior Court of Pottawatomie County, Oklahoma, is final, binding and conclusive and that said cause be in all things dismissed and the prayer of the Com-
22 plaint be denied and that defendant recover all costs

in this behalf expended and all relief that he may show himself entitled to in the premises.

F. H. REILY, Defendant,
By GOODE, DIERKER & GOODE,
His Attorneys.

State of Oklahoma, Pottawatomie County—ss.

F. H. Reily, being duly sworn upon oath, says that he has read over the foregoing answer and motion to dismiss and knows the contents thereof and the statements and allegations therein contained are all true.

F. H. REILY.

Subscribed and sworn to before me this the 29th day of January, 1931. Lillian Hunt, Notary Public. My commission expires April 22, 1931.

Exhibit A.

Warranty Deed.

Know All Men by These Presents:

That we, Wah-pe-com-e sole surviving heir of Wah-
23 puck-we-che, deceased, who died a resident of Muzquiz Mexico and said Wah-pe-com-e, being a resident of the Republic of Mexico, State of Coahuila De Zaragoza, District of Monclova, City of Muzquiz, having an allotment of land in the State of Oklahoma, same allotted to me under allottment certificate No. 42 and known and described as the West One-half of the Southwest Quarter of Section Fourteen (14), Township Twelve (12), Range One (1) East, joined by his wife Sah-nah-ka-moquah, parties of the first part, in consideration of the sum of Fifteen Hundred ($1500.00) Dollars, and other good and valuable consideration in hand paid the receipt of which is hereby acknowledged does hereby grant, bargain, sell and convey unto F. H. Reily of Pottawatomie County, State of Oklahoma, party of the second part the following described real property and premises situated in Pottawatomie County, State of Oklahoma, to-wit:

The West One-half (W½) of the West One-Half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10) North, Range Three

(3) East of the Indian Meridian, same not being a homestead and containing forty (40) acres, more or less, and being a portion of the land allotted to Wah-puck-we-che No. 225 Mexican-Kickapoo Indian who is now deceased, having died in the year 1929, intestate, leaving the said Wah-pe-com-e as her sole and only heir, and being a resident in good faith at the time of her death of the Republic of Mexico and a non-resident of the State of Oklahoma,

together with all the improvements thereon and the appurtenances thereunto belonging and warrant the title to the same.

To have and to hold said described premises unto the said party of the second part, his heirs and assigns forever free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages and other liens and incumbrances of whatsoever nature.

Signed and delivered this 20th day of May, 1930.

WAH-PE-COM-E
(His X Mark),
SAH-NAH-KA-MOQUAH
(Her X Mark).

The names of Wah-pe-com-e and Sah-nah-ka-moquah, written by Tom Johnson at their request and in the presence of Tom Johnson and Ma-ka-seah, as witnesses; Tom Johnson, Ma-ka-se-ah.

State of Oklahoma, Pottawatomie County—ss.

Before me, the undersigned, a Notary Public in and for said County and State, on this 20th day of May, 1930, personally appeared Wah-pe-com-e and Sah-nah-ka-moquah, husband and wife to me known to be the identical persons who executed the within and foregoing instrument by their mark in my presence and in the presence of Tom Johnson and Ma-ka-se-ah, as witnesses and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal the day and year last above written. Lillian Hunt, Notary Public. My commission expires April 22, 1931. (Seal)

Filed for record May 20, 1930, at 3:30 o'clock p. m., and duly recorded in Book 127 of Deeds, on page 343.

Exhibit B.

State of Oklahoma, Pottawatomie County—ss.

In The Superior Court Thereof.

F. H. Reily, Plaintiff, vs. Wa-pe-com-e and Sah-nah-ka-moquah, Defendants. No. 6589.

Journal Entry of Judgment.

Now on this the 20th day of December, 1930, the
24 court being in due and lawful session and the above entitled cause coming on for hearing and the plaintiff appearing in person, and the defendants and each of them having been duly and legally served with summons personally and failing to answer, demur or otherwise plead in said action are hereby adjudged in default.

Thereupon the plaintiff waived a jury and submitted the issues of law and fact to the court, and the court being fully advised from the evidence in said cause, finds that Wah-puck-we-che was a member of the Mexican-Kickapoo tribe of Indians and was enrolled as No. 225. That she was allotted, by the United States Government, the West One-half of the Northeast Quarter of Section Nine, Township Ten North, Range Three East of the Indian Meridian, containing eighty acres more or less, and located in Pottawatomie County, Oklahoma.

The court further finds that the said Wah-puck-we-che became a citizen of the Republic of Mexico, and a non-resident of the United States of America prior to the 21st day of June, 1906, and continued as a resident of the Republic of Mexico from that date until the time of her death and that while in the Republic of Mexico she associated with and affiliated with the Mexican-Kickapoo Indians residing in the Republic of Mexico.

The court further finds that the said Wah-puck-we-che is dead, having died at a period exceeding three years prior to the filing of the petition herein, intestate, and that no administration proceeding has ever been had upon her estate and no court, having jurisdiction has ever determined who were her heirs, or entitled to a distributive share of her said estate.

The court further finds that at the time of her death she was seized and possessed of the above described land.

The court further finds from the evidence that the said Wah-puck-we-che left as her sole surviving heir, her son, Wah-pe-com-e and that no other person or persons was, or were, entitled to inherit the land belonging to the said Wah-puck-we-che that she died seized and possessed of, and that upon her death the land descended to and became vested in her son, Wah-pe-com-e.

The court further finds that the said Wah-pe-com-e was allotted, by the United States Government, by certificate No. 12, the West Half of the Southwest Quarter of Section Fourteen, Township Twelve, Range One East and the court further finds from the evidence that the said Wah-pe-com-e was a full-blood Mexican Kickapoo Indian and that on and prior to June 21, 1906, he removed from the United States of America and became a resident of the Republic of Mexico and that he affiliated with said tribe of Mexican-Kickapoo Indians residing in the Republic of Mexico.

The Court further finds that upon the death of the
25 said Wah-puck-we-che, that under and by provision of an act of the Congress of June 21, 1906, the allottment of the said Wah-puck-we-che was no longer restricted and that the said Wah-pe-com-e had a good right to sell said land and that the United States Government no longer had jurisdiction over said land, or any right to prevent the said Wah-pe-com-e from selling same, or disposing of it as to him might seem proper.

The Court further finds that on the 20th day of May, 1930, the plaintiff purchased from the said Wah-pe-com-e, for a good and valuable consideration, the West One-half of the West One-half of the Northeast Quarter of Section Nine, Township Ten North, Range Three East of the Indian Meridian, located in Pottawatomie County, Oklahoma, and paid him a good, lawful and valuable consideration thereof, and went into actual and peaceable possession of said property and is now in possession thereof and that the said Wah-pe-com-e joined by his wife, Sah-nah-ka-moquah, on said date, conveyed said land to this plaintiff by a lawful, valid and subsisting general warranty deed, and that said deed has been placed of record in the Office of the County Clerk of Pottawatomie County, Oklahoma.

The court further finds that by reason of the evidence introduced in said cause that the United States Government has no control over said land, or right to direct any of the

acts of the said Wah-pe-com-e in connection with said land by reason of the removal of the restriction thereof, as provided under the act of the Congress of June 21, 1906.

The court further finds that the prayer of the petition should be in all things taken as true and that the plaintiff is entitled to the relief prayed for therein.

It is therefore ordered, adjudged and decreed by the court that the title to the following described land, is hereby quieted in the said plaintiff:

The West One-half (W½) of the West One-half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10) North, Range Three (3) East of the I. M., located in Pottawatomie County.

It is further ordered, adjudged and decreed by the court that all of the right, title, interest, estate and equity of the said Wah-pe-com-e and the said Sah-nah-ka-moquah, be, and the same is hereby divested out of the said defendants and vested in the said plaintiff and that the said defendants and each of them and all persons claiming by, through or under them are hereby forever enjoined and restrained from asserting any title, estate or equity in or to said land or any part thereof.

(Signed) LEANDER G. PITMAN, Judge.

Certificate of True Copy.

State of Oklahoma, Pottawatomie County—ss.

I, Mabel Marlatt, Court Clerk in and for said County and State, do hereby certify the attached to be a full, true and correct copy of the original Journal Entry of Judgment now on file and of record in the matter of the F. H. Reily v. Wah-pe-com-e, Case No. 6589 in the office of the Court Clerk, Sup. Court, Shawnee, Oklahoma.

In witness whereof, I hereunto affix my hand and the seal of said Court this the 30th day of Jan., 1931. Mabel Marlatt, Court Clerk, by Ethel W. Malone, Deputy.

Exhibit C.

State of Oklahoma, Pottawatomie County—ss.

Affidavit.

Tom Johnson and Ma-ka-se-ah, being duly sworn upon oath say that they are Mexican-Kickapoo Indians. That we are well acquainted with Wah-pe-com-e and his wife Sah-nah-ka-moquah. That we were also well acquainted with Wah-puck-we-che, mother of Wah-pe-com-e, during her life-time. To our personal knowledge Wah-puck-we-che is dead, she being at the time of her death, a resident of Muzquiz, Mexico, and a non-resident of the State of Oklahoma.

We also know where Wah-pe-com-e and his said wife reside. We know that Wah-pa-com-e established his residence in the Republic of Mexico in the year 1906, and that he resided in Mexico from that time continuously for a period of more than ten years. That the said Wah-pe-com-e is the sole and only heir of the said Wah-puck-we-che. Wah-puck-we-che only had one child who is Wah-pe-com-e, and therefore he is the sole and only surviving heir of the said Wah-puck-we-che.

We further state that we were well acquainted with the said Wah-puck-we-che, and are also well acquainted with Wah-pe-com-e and have known them for a great many years.

This affidavit is made for the purpose of identifying the said Wah-pe-com-e as the heir of Wah-puck-we-che and for advice concerning his right to make a deed to the West Half of the West Half of the Northeast Quarter of Section Nine (9), Township Ten (10), Range Three East in Pottawatomie County, Oklahoma, as the sole surviving heir of Wah-puck-we-che, his mother.

(Signed) TOM JOHNSON,
MA-KA-SE-AH.

Subscribed and sworn to before me this the 20th day of May 19, 1930. Lillian Hunt, Notary Public. My commission expires April 22, 1931. (Seal)

Filed for record May 20, 1930, at 3:40 o'clock p. m., and duly recorded in Book 138 of Miscellaneous, on page 353.

Exhibit D.

State of Oklahoma, Pottawatomie County—ss.

Statement Under Oath, Made by Ma-ka-se-ah and Tom Johnson Members of The Kickapoo Tribe of Indians, in the Matter of the Death and Proof of Heirship to the Estate
27 of Wah-puck-we-che, Deceased, a Mexican Kickapoo Indian, of the Shawnee Indian Agency at Shawnee, Oklahoma, in the Office of F. H. Reily, and before Lillian Hunt, a Notary Public in and for Pottawatomie County, Oklahoma.

Q. State your name, age and place of residence.

A. Ma-ka-se-ah. Forty-eight years old, reside in Pottawatomie County.

Q. Did you know Wah-puck-we-che, a member of the Kickapoo Tribe of Indians?

A. Yes.

Q. Is she living or dead?

A. She is dead.

Q. Do you know about when she died?

A. About two years ago.

Q. Did Wah-puck-we-che have an allottment of land alloted to her by the Government?

A. Yes.

Q. Where was it located?

A. The West Half of the Northeast Quarter of Section Nine, Township Ten, Range Three East of the Indian Meridian.

Q. Was Wah-puck-we-che married at the time of her death?

A. No.

Q. Had she been married at any time?

A. Yes.

Q. How many children did she have by the first marriage?

A. Had two children.

Q. A boy or girl?

A. One boy and one girl.

Q. Of the second marriage?

A. Just one boy.

Q. What was the name of the boy by the second marriage?

A. Wah-pe-com-e.

Q. Are the children by her first marriage living or dead?

A. Dead.

Q. About how many years ago did they die?

A. Girl died thirty-two year ago.

Q. Boy?

A. He died about thirty years ago.

Q. Was this boy and girl by the first marriage, were they ever married?

A. No. Girl died when she was sixteen years old. The boy about twenty-five.

Q. About how old is Wah-pe-com-e, the only son of Wah-puck-we-che?

A. About thirty-nine.

Q. Did Wah-puck-we-che's husbands die before she died?

A. Yes.

Q. Did Wah-puck-we-che ever live in Old Mexico?

A. Yes.

Q. Do you know about when she went to Old Mexico?

A. About 1903.

Q. How long did she stay down there??

A. She was making her home there at the time she died.

Q. Did Wa-pe-com-e ever live in Old Mexico?

A. Yes.

Q. He went down there and lived with his mother?

A. Yes.

Q. Did Wah-puck-we-che and Wah-pe-com-e affiliate
28 with the Mexican Kickapoo Tribe of Indians while there?

A. Yes.

Q. Did she have any children or grand children at the time of her death, other than Wah-pe-com-é?

A. The only grand child she had was the child of Wah-pe-com-e.

Q. Do you know who her sole heir was at the time she died?

A. Yes.

Q. Who was it?

A. Wa-pe-com-e.

Q. Did you ever talk with Wah-pe-com-e about his mother making a will at the Agency?

A. Yes.

Q. Who did he say the will was made to?

A. Wa-pe-com-e.

Q. Do you know where this will was ever approved by the Secretary of the Interior?

A. No.

Q. Did Wah-pe-com-e tell you where his mother's will was made?

A. Yes. At the Indian Agency.

Q. Did you ever talk with Wah-pe-com-e about how many heirs his mother left?

A. Yes.

Q. Who did he say was the only heir?

A. Wa-pe-com-e.

Q. Have you any financial interest in the land that was allotted to Wah-puck-we-che and inherited by Wah-pe-com-e?

A. No.

(Signed) MA-KA-SE-AH.

Subscribed and sworn to before me this the 6th day of December, 1930. Lillian Hunt, Notary Public. My commission expires April 22, 1931. (Seal)

I, Tom Johnson, being duly sworn upon oath say that I am a member of the Kickapoo tribe of Indians and that I was present at the time the above statement was made by Ma-ka-se-ah and I know the contents thereof and the statements therein contained are true.

(Signed) TOM JOHNSON.

Subscribed and sworn to before me this the 6th day of December, 1930. Lillian Hunt, Notary Public. My commission expires April 22, 1931. (Seal)

Endorsed: Filed in District Court on Jan. 31, 1931.

(Order denying temporary injunction and setting case for final hearing.)

[Before Judge Vaught.]

On this 31st day of January, 1931, the complainant
29 appears by W. E. Wiles, Esq., Assistant United States Attorney, and the defendant in person and by Mark Goode, Esq., his attorney. Thereupon, application of the complainant for temporary injunction comes on for hearing, and the Court being duly advised, it is ordered that said application be and the same is denied and exceptions allowed the complainant, and this cause is assigned for final hearing in Federal Court Room at Oklahoma City, Oklahoma, on February 25, 1931. at 9:30 a. m.

Decree.

This cause came on to be heard at this term and
30 was argued by counsel, and thereupon the following findings of fact and conclusions of law were made and entered:

Findings of Fact.

1. The court finds that the West One-half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10), Range Three (3) East of the Indian Meridian, containing eighty (80) acres more or less, located in Pottawatomie County, Oklahoma, was allotted to Wah-puck-we-

che, as a member of the Kickapoo Tribe of Indians and that her allotment number was 225.

2. That the said allottee died in January, 1929, and left as her sole and only heir, Wa-pe-com-e, her son, and the said Wa-pe-com-e inherited said land.

3. That said Wah-puck-we-che and Wa-pe-com-e left Oklahoma and went to Old Mexico in the year 1903 and each of said persons were adults and resided there many years and after the passage of the act of June 21, 1906. That each of said Indians became non-residents of the United States within the meaning and perview of the Act of June 21, 1906.

That the said Wah-puck-we-che returned to the United States in the year 1927 and died in Oklahoma, but was a resident of Old Mexico at the date of her death.

4. That the said Wa-pe-com-e returned to the United States about the year 1920 and has resided in the United States since said date. That the said Wa-pe-com-e as the sole heir of Wah-puck-we-che deceased, conveyed the West One-half (W½) of the West One-half of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10) North, Range Three (3) East of the Indian Meridian, containing forty (40) acres, by warranty deed dated the 20th day of May, 1930.

That Charles Eggers, United States Superintendent
31 of the Shawnee Agency, entered into an agricultural lease with J. T. Craig on the 8th day of October, 1930, leasing said land on behalf of the undetermined heirs of the said Wah-puck-we-che, for the year 1931. That the said F. H. Reily filed suit in the District Court of Pottawatomie County, and obtained a permanent injunction against the said J. T. Craig, Charles Eggers, United States Superintendent, and Charles W. Edmeister, United States Indian Farmer, restraining and enjoining them from interferring with the said Reily's possession in and to said forty acres of land.

That thereafter he filed suit in the Superior Court of Pottawatomie County and obtained a judgment quieting his title in and to said land against any claims of the said Wa-pe-com-e. That thereafter this suit was brought in this court to restrain the said Reily and his tenants from occupying said land or interferring with the use and occupation thereof.

Conclusions of Law.

1. The court finds as a matter of law that neither of the judgments rendered in the State court and plead by the said F. H. Reily, or the proceedings had there are barred by this action, or in any way prevent this court from entertaining this suit.

2. That upon the death of Wah-puck-we-che the said Wa-pe-com-e became vested with full power and right to convey any and all of said land and to pass good title thereto, free, clear and discharged of and from any supervision and control by the United States, and the conveyance made by the said Wa-pe-com-e to F. H. Reily, conveyed good title to the West One-half of the West One-half of the Northeast Quarter of Section Nine, Township Ten North, Range Three East of the Indian Meridian.

It is therefore by the Court, considered, ordered and adjudged, that the plaintiff and those for and on whose behalf this action was brought, have no right, title, interest or claim in or to said land or any part thereof, and that this
32 bill be dismissed. Exceptions allowed the complainant.

COLIN NEBLETT, Judge.

Endorsed: Filed in District Court on Feb. 25, 1931.

(Citation in proper form, directed to appellee, with acceptance of service by counsel for said appellee, was filed in the District Court on June 1, 1931.)

Notice of Appeal.

Defendant in the above entitled cause is hereby noti-
2 fied that the plaintiff herein appeals from the decision of the Court as entered on the 25th day of February, 1931; said appeal to be to the United States Court of Appeals for the Tenth Circuit in accordance with the citation as issued in this cause on the 22nd day of May, 1931.

ROY ST. LEWIS,
United States Attorney,

WILLIAM EARL WILES,
Assistant United States Attorney,
Attorneys for Plaintiff.

Service of the above notice of appeal accepted this 26th day of May, 1931.

MARK GOODE,
CHAS. E. DIERKER,
JOHN L. GOODE,
Attorneys for Defendant.

Endorsed: Filed in District Court on June 1, 1931.

(Omitted: Orders of July 1, 1931; Aug. 26, 1931;
8 Oct. 16, 1931; Nov. 13, 1931; and Dec. 19, 1931, each extending time within which to docket appeal.)

Order.

It is this day ordered, for good cause shown, that the time in which the said appellant may docket said case and file a transcript of the record herein, in the United States Circuit Court of Appeals, be and the same is extended to February 22, 1932.

January 20, 1932.
1192 Eq.

EDGAR S. VAUGHT,
U. S. District Judge.

Endorsed: Filed January 20, 1932, Theodore M. Filson, Clerk, by Glenn H. Grubb, Deputy.

Order.

It is this day ordered, for good cause shown, that
33 the time in which the plaintiff may file its bill of exceptions herein be and the same is extended to September 13, 1931.

July 1, 1931.

EDGAR S. VAUGHT,
U. S. District Judge.

Endorsed: Filed July 1, 1931. Theodore M. Filson, Clerk, by Grace G. Butler, Deputy.

Order.

It is this day ordered, for good cause shown, that
34 the time in which the plaintiff may file its bill of exceptions herein be and the same is extended to November 3, 1931.

September 12, 1931.

EDGAR S. VAUGHT,
U. S. District Judge.

Endorsed: Filed Sept. 12, 1931. Theodore M. Filson, Clerk, by Glenn H. Grubb, Deputy.

Order.

It is this day ordered, for good cause shown, that
35 the time in which the plaintiff may file its bill of exceptions and narrative statement of the evidence herein be and the same is extended to November 20, 1931.

October 16, 1931.

EDGAR S. VAUGHT,
U. S. District Judge.

Endorsed: Filed in District Court on Oct. 16, 1931.

Order.

It is this day ordered, for good cause shown, that
36 the time in which the plaintiff may file its bill of exceptions and narrative statement of the evidence herein be and the same is extended to December 22, 1931.

November 13, 1931.

EDGAR S. VAUGHT,
United States District Judge.

Endorsed: Filed in District Court on Nov. 13, 1931.

Order.

It is this day ordered, for good cause shown, that
37 the time in which the plaintiff may file its bill of exceptions and narrative statement of the evidence herein be and the same is extended to January 22, 1932.

December 19, 1931.

EDGAR S. VAUGHT,
United States District Judge.

Endorsed: Filed in District Court on Dec. 19, 1931.

NARRATIVE STATEMENT OF THE EVIDENCE.

Before Hon. Colin Neblett, Judge.

Appearances: For the United States, William Earl
38 Wiles, Assistant United States Attorney. For the Defendant, Messrs. Goode, Dierke & Goode, by Mr. Mark Goode.

It was stipulated in open Court as follows:

It is stipulated and agreed that the land involved in this controversy was allotted to Wah-puck-we-che, a Kickapoo allottee, and that they are located in Pottawatomie County, Oklahoma, and that the said Wah-puck-we-che went to Mexico about the year 1903, and resided there continuously until about the year 1927, which year she returned to Oklahoma and died in Oklahoma and was buried in Oklahoma. That Wah-puck-we-che had one child, one son, Wa-pe-com-e, the grantor in the deed to F. H. Reily, involved in this action. That Wa-pe-com-e is an adult Kickapoo and that he received an allotment in his own right in Oklahoma as such Kickapoo; that he went to Mexico with his mother about the year 1903, and resided in said country continuously until about ten (10) or twelve (12) years ago, and he is now in the United States, and was here at the time said deed was executed.

Plaintiff's Exhibit A, being the original trust patent to the lands embracing the lands involved in this action, was offered and received in evidence, without objection, said ex-
39 hibit being as follows:

4-457a.

The United States of America.

To all to whom these Presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States a schedule of allotments of land, dated June 18, 1894, from the Acting Commissioner of Indian Affairs, approved by the Acting Secretary of the Interior September 12, 1894, whereby it appears that in conformity with the agreement with the Kickapoo Indians in Oklahoma Territory, ratified and confirmed by the Act of Congress approved March 3, 1893 (27 Stats. 557), Wah-puck-we-che, an Indian on the Kickapoo Reservation in Oklahoma Territory has been allotted the following described land, viz:

The West Half of the Northeast Quarter of Section Nine in Township Ten North of Range Three East of Indian Meridian in Oklahoma Territory containing eighty acres.

Now, know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of said agreement and of the fifth section of the Act of Congress of the 8th February, 1887, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said Wah-puck-we-che, or in case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: provided, that the President of the United States may, in his discretion, extend the said period.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made Patent and the seal of the General Land Office
40 to be hereunto affixed.

Given under my hand at the City of Washingtno, this sixth day of October, in the year of our Lord one thou-

sand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

By the President:

(Seal)

GROVER CLEVELAND,
By M. McKEAN, Secretary,
L. T. C. LAMAR,
Recorder of the General Land Office.

Recorded Vol. 35, p. 210.
(12695-10M.) 6-400

Plaintiff offered in evidence Exhibit B, being certified copy of Presidential orders extending the trust period on Kickapoo lands for a period of five years from February 27, 1919, and ten years from June 19, 1924, which offer was objected to and overruled by the Court, and said Exhibit B was received in evidence, and omitting certificate is as follows:

File 18455/19

Executive Order.

It is hereby ordered under authority contained in Section 5 of the Act of February 8, 1887 (24 Stat. L., 388), that the trust period on allotments made to the Mexican-Kickapoo Indians in Oklahoma, which trust expires during the calendar year one thousand nine hundred and twenty-four, be and is hereby extended for a period of ten years.

CALVIN COOLIDGE.

The White House, June 19, 1924.

(No. 4029.)

Office of Indian Affairs. Received March 11, 1919. 21432.

Executive Order.

It is hereby ordered under authority contained in Sec-
41 tion Five of the Act of February 8, 1887 (24 Stat. L., 388), that the trust period on allotments made to the Mexican-Kickapoo Indians in Oklahoma, which trust expires during the calendar year one thousand nine hundred and nineteen, be and is hereby extended for a period of five years.

WOODROW WILSON.

The White House, 27 February, 1919.

(No. 3047.)

Testimony of J. A. Phifer, for plaintiff. J. A. Phifer, called on behalf of plaintiff, duly sworn, testifies:

Direct Examination.

I hold the official position of Senior Clerk in the office of the Shawnee Indian Agency. We leased the lands in controversy to Mr. Craig. Exhibit C is an agricultural lease. It is a copy of the lease made to Mr. Craig on October 18, 1930, and approved by the superintendent. The original of the lease is filed with the General Accounting office at Washington, and this copy above referred to is retained in our office.

Plaintiff then offered Exhibit C, being the copy of the agricultural lease aforesaid, in evidence, and which is admitted by the Court and received in evidence, over the objection of defendant as follows:

Mr. Goode: We object, it is incompetent, irrelevant and immaterial, and for the further reason that it has not been properly predicated, it is not the regular departmental lease, is not made under rules and regulations of the Secretary of Interior, it shows on its face that it is a lease executed
42 by Craig and Charles Eggers, superintendent and acting for the undetermined heirs of Wah-puck-we-che. No authority for any such lease as that. There is a regulation under the leasing statute that authorizes an Indian Agent to lease Indian lands and sign the lease for minor heirs, but there is no regulations except this in existence, and I make this statement advisably, as to this the Land Department merely acts in an advisory capacity for the Indian where he has been non-resident in Mexico. Their records show when he was down there, the agent makes its power of attorney and executes the lease as in this case.

The Court: Objection will be overruled. It will be admitted.

I don't know whether or not Mr. Craig took possession of the land under that lease or went into possession of the land. Exhibit D is the rules and procedure prescribed by the Secretary of the Interior for determining heirs and for approving wills of deceased allottees.

Upon Exhibit D being offered in evidence by plaintiff, counsel for defendant in open Court stated: "We admit, if the

Court please, th[illegible] the sale jurisdiction is in the Secretary of the Interior to determine the heirs of deceased allottees where lands are held in trust."

Our records show Wah-puck-we-che died January 29, 1929. Her heirs have not been determined by the Secretary of the Interior.

Cross-Examination.

Do not know as a fact that Wa-pe-com-e is the sole heir. Since Wah-puck-we-che's death we have placed the rental money to the account of the estate of Wah-puck-we-che. We have paid some of it to Wa-pe-com-e. Don't know that Wa-pe-com-e is her only relative. We have Wah-puck-we-che's will. We have had the will ever since she made it. The will is dated March 12, 1926. I have seen the will before today. I am satisfied Wa-pe-com-e is the heir, but the secretary is the one to say. It is my opinion Wa-pe-com-e will be the heir, but he is not the heir until this is approved according to the regulations. I don't know who had possession of this land in 1930. We don't have a lease for 1930. Wa-pe-com-e in 1930 started to lease the land but it was not completed. After 1930 Mr. Eggers made a lease for 1931 with Wa-pe-com-e's consent. I did not know Wa-pe-com-e had leased the land to Easman for 1931. He did not tell me and I did not ask him. Since 1923 the superintendent is authorized to lease restricted Indian land, deceased Indian where the heirs are undetermined without the consent—this authority is in the leasing regulations. We have paid Wa-pe-com-e less than $100.00. That was since his mother died in 1929. That must have been for last part of 1929 rental. It may have accumulated from her leasing with the approval of the superintendent. In 1930 we didn't make any lease. January 1, 1931, we collected half the rent. We have authority from the secretary to pay to anybody. We do not hold the money available whenever the heirs are undetermined.

Redirect Examination.

Wah-puck-we-che made a will in 1926 and it has been in our office ever since. It has not been approved by the secretary. It has not been submitted within one year of the death of Wah-puck-we-che in 1929 for approval.

Plaintiff's Exhibit C, the agricultural lease above referred

to and admitted in evidence, being a lease in regular printed form as used by the Indian Agency, was lease #6720, Tribe Mexican Kickapoo, and allotment #225, and was executed by the superintendent acting for and on behalf of the undetermined heirs of Wah-puck-we-che, deceased, to Jake F. Craig for lands described as follows: Except East of ditch and North of railroad about twelve (12) acres and team in pasture of West Half (W½) of Northeast Quarter (NE¼)-9-10 North, Range East Indian Meridian containing Sixty-eight (68) acres, more or less, for the term of one year, beginning January 1, 1931, and ending December 31, 1931, for an annual rental of one hundred fifty dollars ($150.00) payable semi-annually on January 1, 1931, and July 1, 1931. The lease was accepted by Wa-pe-com-e on October 3, 1930, and signed and executed by all parties on October 18, 1930,
44 and approved by Charles Eggers, the Superintendent, on that date. The fact of the lease and its terms are not in dispute and we make the above condensed statement concerning it rather than copying the same at length herein, as the lease if set out in full would unduly lengthen this record.

Testimony of J. F. Craig, for plaintiff. J. F. Craig called on behalf of plaintiff, duly sworn, testifies:

Direct Examination.

I am the J. F. Craig named in the lease in question. I took possession of this eighty (80) acres in question, under the lease in November. The land is used for corn, cotton, oats, alfalfa, and whatever you choose to put it in. There are only an old house and barn on the place. I do not live on it. After going into possession of the land I cleaned it up, cut sticks, raked, started to plow, started to fix it up for the crop. I was stopped the latter part of December. Mr. Reily had an injunction served on me from taking it in possession. I was enjoined from doing anything on this west half of the northeast quarter of Section 9, Township 10, Range 12. At the time I was stopped I was ready to break the land, had plowed one-half a day. The fore part of January I was served with a citation in the contempt proceedings mentioned in this matter. The citation was dismissed. Mr. Reily on the 4th day of this month (February) took possession of the

west half of the west half of this land. He took fences out, cut ditches, put up terraces. On the 19th of this month he commenced to plow this land and has plowed ten (10) or twelve (12) acres. I don't think he has plowed since Saturday. Corn should be planted by the 15th of next month. I was going to plant this forty (40) acres in corn.

Cross-Examination.

J. F. Atkenson farmed this land last year. I don't know whether he paid the rent to Wa-pe-com-e. I made lease October 18. I did not know before making the lease that Mr. Reily had a deed, or that he expected to take possession the first of the year. I received the original of this letter after I had taken the lease—after the application was put in. I did not tell the Indian Agency about the letter. I knew Reily claimed to own the land according to that letter. I received the letter but wouldn't say the exact date, it is dated October 12.

Letter is identified as Defendant's Exhibit 1. I received the original of that letter. There are no improvements on Reily's forty (40) acres of the land. I did not know that East had a lease of record at the time of my lease.

October 12th, 1930.

Mr. J. T. Craig, Shawnee, Okla.,

Dear Sir: I have been informed that you claim a lease on the west one-half of the west one-half of the Northeast one-quarter of Section Nine, Twp. Ten, Range Three east in this County.

This land belongs to me and was conveyed to me by the heir to same. You are notified not to attempt to take possession of this land under your supposed lease as no one has any right to same but the undersigned.

Respectfully,

Testimony of Charles W. Edmister for plaintiff. Charles W. Edmister called on behalf of plaintiff, duly sworn, testifies:

I am district farmer at the Shawnee Agency. I was served with an order of injunction in Mr. Reily's case. It was in

the county court and not to interfere with the possession of this land. I have been district farmer for eleven years and know Wa-pe-com-e. He lives on part of the land. During this time Wa-pe-com-e has lived in this neighborhood. He is a married man with a family. I knew his mother Wah-puck-we-che.

46

Cross-Examination.

Wa-pe-com-e lives on a part of the original allotment since the first of the year. His present wife's name is Okenaw. I am not able to say whether she was born in Mexico. She was one of the older girls. I don't think she has an allotment of her own. I do not know that they were all born in Mexico. Okama was one of the chiefs of Kickapoo Tribe in Mexico. I have heard he was trustee, along with Bentley, who received $215,000.00.

Testimony of Wah-pe-com-e for plaintiff.

Wah-pe-com-e called on behalf of plaintiff testified through an interpretor:

Direct Examination.

My name is Wah-pe-com-e, and I am 38 years of age. I live on my mother's allotment this side of Shawnee, and have lived there twelve years. I have a family and have been married nineteen years. Before I came here I was living with my mother in Old Mexico. I came to Oklahoma with my wife because I didn't want to stay in Mexico. When I first came back to Oklahoma I stopped at Wa-pe-caw's place. I came back to make Oklahoma my home. I remember when my mother died. I was here when she died. I went back to Mexico a short time after her death. Stayed there about one week. I went back to straighten out my mother's home and see about her stuff. She had a home there. After I returned from Mexico I went to the place where I was living. This is the only time I have been back since my mother's death. When I went down there after my mother's death I did not go to make Mexico my home.

Cross-Examination by Mr. Goode.

I lived in Coahuila but came here from Musquiz. I lived in Sonora two years. I remember when I went to Mexico in

1901. My present wife's name is Ok-e-ma. Her father's name was Os-ma-que and her mother's name Na-na-she. My wife's mother lived in Mexico at a village Naciemento. He had one of Bentley's daughter for a wife, and she is now living with him. I had an allotment. I sold it to Duchene,
who was agent at that time and was living here. Wash-
47 ington sold his allotment.

Mr. Goode: I believe the Court will take judicial notice that an Indian living here, selling his allotment, unless there is some reason for it.

Mr. Wiles: I think as a matter of fact they sold those allotments not by reason of any fact of residence or non-residence, it is under an Act of Congress, with the permission of the Department to authorize the sale under the regulations.

Mr. Goode: There is one paragraph in the appropriation bill that authorizes the sale of any Indian allotment land, only one I am familiar with, that is the one that is utilized in this case, not probably a half a dozen with the Secretary's approval.

I had brothers and sisters but they are all dead. They died way back before my mother. My father died several years before my mother. After my mother died I went back to Mexico. My mother didn't own any property there she just had a home. She had trunks and her clothes at Naciemento. People out there don't own their land separately. They own it all together. It belongs to just one tribe. That was the reason why I came back. I thought I didn't have any right over there. That was what made me come back.

J. A. Phifer, recalled on behalf of plaintiff.

Mr. J. A. Phifer, recalled by plaintiff testifies:

Plaintiff's Exhibit E is regulations to Indian Agents, approved by Secretary of Interior May 9, 1929, for leasing allotted and tribal lands for farming, grazing and business purposes, and the one under which our office leases Indian land. Plaintiff offered in evidence Exhibit E and particularly paragraph seven (7) on page two (2) thereof. Defendant
objected on ground rules and regulations only relate
48 to leasing trust lands and that the land in question is not held in trust at the time. Objection overruled and

exceptions allowed. Exhibit E, paragraph seven (7), admitted in evidence.

> Leases of inherited lands where the heirs have not been officially determined shall be made by the superintendent and limited to one year unless specific authority for a longer term has been granted by the Commissioner of Indian Affairs. Rentals shall be deposited to the credit of the estate pending the formal determination of the heirs. Thereafter, if the adult heirs who own a majority of interest in the land desire and agree to lease it, and one or two heirs, after proper explanation, refuse, the superintendent should report the facts to the Commissioner of Indian Affairs with the recommendation that he be authorized to sign for them.

Defendant's Exhibit 2 is a copy of a letter signed by Assistant Secretary John H. Edwards and on file in our office. It was offered and received in evidence as follows:

L 21500-25 W D W Jan. 5, 1926.

The Honorable The Secretary of the Interior.

Sir: On June 10, 1925, the Department returned without approval an oil and gas lease executed by Pa-ka-ta-mo-quah, sole heir of The-kah-qua-muck, deceased Mexican Kickapoo allottee No. 272, in favor of William L. Bowie. The Department took the view that under a provision in the Act of June 21, 1906 (34 Stat. L., 325-363), relative to adult Kickapoo and certain other Indians who were non-resident in the United States, leases by such non-resident owners were not subject to its supervision, adding that apparently under the terms of the statute leases by such adults cannot be made for a term in excess of five years.

Mr. Bowie through his attorney, George Paschal, requests that a reconsideration of the action of the Department in this lease and also asks approval of an oil and gas lease to Mr. Bowie from the heirs of Pah-kah-tuck, deceased Mexican Kickapoo allottee No. 274. In his letter of November 5, 1925, Mr. Paschal says that he agrees with the Department in the opinion of the law as to its jurisdiction over the class of lands affected by the Act of June 21, 1906, but disagrees with its views as to not taking action on the leases.

He invites attention to the fact that Mr. Bowie in obtaining these leases on Department form was acting in compliance with the requirements of this Department and went to considerable expense, time and trouble in obtaining the
49 signatures of the Indians to the Department form of lease. By their terms the leases become effective from the date of approval by the Secretary of the Interior, and Mr. Paschal urges that Department approval could in no way harm the parties to the leases, citing in connection therewith the practice of the Department in approving deeds executed by full-blood heirs of allottees of the Five Civilized Tribes after the Act of May 28, 1908, went into effect. The concluding paragraphs of this letter read:

"All that the lessee asks is that the Secretary of the Interior, acting as the arbiter for both parties to the lease contract, examine these leases and if he finds that the provisions therein contained are fair and just and no advantage taken by either party that he approve the leases and thus validate them and start them to running. The lessee has no objection to the Department supervising the payments to the lessors.

"We therefore respectfully request that in all fairness to all the parties to these lease contracts you accept the appointment as arbiter for the unrestricted adult parties and if you deem the lease contracts fair and just that you approve the same. And that for the minor interest and restricted adult interests in lease No. 10733, you exercise the jurisdictions and authority given you by the acts of Congress and the Regulations of the Department and if you find the lease contract entered into by Supt. A. W. Leech, for the minor lessor and the restricted adult heirs, fair and just, that you will approve the same."

The records of the Office show that Tho-kah-qua-muck died in the year 1904, leaving as her sole heir her unallotted daughter, Pa-ka-ta-mo-quah, resident of old Mexico. In the case of Johnson vs. the United States (283 Fed. Rep. 954), the court held in effect that restrictions were not removed from the original allotments of non-resident Indians of the tribes named in the Act of June 21, 1906, but that such Indians could lease their allotments without restrictions for a period of not to exceed five years. As to the removal of

restrictions from inherited land, it indicated that three things were necessary. First, that the deceased allottee was a member of one of the tribes named in the Act. Second, that the heir was also an adult member; and third, that he had been allotted land in his own right. The heir in this case is an adult nonresident Kickapoo Indian but has no allotment of her own right. All the facts with regard to the status of the heir were not brought out in Office letter of May 27, 1925, to the Department, and the Office therefore respectfully requests a reconsideration of this lease, and that it be approved as written. Attention is invited in this connection to a letter addressed to the Superintendent of the Shawnee Agency, approved by the Department December 21, 1925, holding in effect that the allotment of Pah-pe-ah, Mexican Kickapoo allottee No. 189 inherited by Ke-ah-nah, an unallotted nonresident Mexican Kickapoo Indian was under the supervision of this Department.

In the case of the lease from the heirs of Pah-kah-tuck, it appears that O-ke-mah, Mexican Kickapoo allottee No. 270 was found to be the sole heir. O-ke-mah was an adult who lived and died in old Mexico. Some of his heirs are living in old Mexico. O-ke-mah being an adult nonresident allottee, it would seem under the ruling in the case of Johnson vs. the United States, that the restrictions were removed from the land he inherited from Pah-kah-tuck and that the allotment is therefore no longer under the supervision of the Department. In order that the lease between the heirs and Mr. Bowie may become effective, it is recommended that it be approved in so far as this Department may have jurisdiction over the subject matter and that the Superintendent, be instructed to relinquish supervision over the lease and the land and to notify the parties to the lease accordingly.

All the papers are enclosed.

Respectfully,

(Signed) F. B. MERITT,
Assistant Commissioner.

Approved as recommended. Jan. 14, 1926.

(Signed) JOHN H. EDWARDS,
Assistant Secretary.

Plaintiff rests.

Defendant's Evidence.

Defendant offered, and there was received in evidence, certain letters written by J. A. Buntin, Superintendent of the United States Indian Agency, at Shawnee, Oklahoma, to the following effect, namely:

Mr. Goode: J. A. Buntin was Superintendent in charge of the Kickapoo Indians in 1913 and 1914, and we have heretofore agreed that the copy of letters written by Mr. Buntin, as appears in this report of the hearing before or on the Indian adoption bill 1914 may be used as originals.

It was further agreed that as there were a large number of names included in the letters that only the names of Wah-puck-we-che, mother of Wah-pe-com-e, and the name of Wah-pe-com-e, grantor herein, should be included.

Mr. Wiles: We have no objection as to the identity and authority of the persons writing it. The only objection we care to make is that it is incompetent, irrelevant and immaterial.

Which objection was overruled and the exception allowed.

Mr. Goode: We now offer a letter dated September 11, 1912, which reads as follows:

Department of the Interior,

United States Indian Service.

U. S. Indian Agency, Shawnee, Okla., September 11, 1912.

The First National Bank, Douglas, Ariz.

Gentlemen: In compliance with instructions from
51 my superior officer and an act of Congress approved August 24, 1912, which I quote as follows: "That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be sent to the First National Bank of Douglas, Arizona, checks payable to the order of the individual Indian owners who are members of the bank of Mexican Kickapoo Indians now resident in the Republic of Mexico, for and in the amount of all moneys known as lease money now on deposit with or in any manner under the control of the agents and officers of the Interior Department and all

like money due or becoming due or collectible by them prior to the first day of January, nineteen hundred and fourteen, and belonging to any of the said Mexican Kickapoo Indians." I respectfully transmit to you the following list of checks, drawn payable to the order of the individual owners who are members of the Mexican Kickapoo Indian Tribe residing in the Republic of Mexico, for proper delivery:

* * * * * *

No. 573, Wah-puck-we-che, female, aged about 59 years $30.00

* * * * * *

In order to aid you in making a correct delivery of these checks, we have indicated the sex and probable age of each Indian to whom said checks were drawn. I suggest that you use the utmost precaution in making proper delivery of these checks, as a wrong delivery of one of these checks may cause your bank much annoyance later on. You will understand that it is only my business to deliver these checks to your bank, and that the responsibility for the proper delivery to the Indian owners is entirely yours. I enclose you receipt in triplicate, which I will thank you to sign and return to this office with the least possible delay, so same may be forwarded with my accounts.

These checks are signed by me for the Indians and need only to be indorsed by the owners. For your information and that of the Indians, I enclose herewith a copy of Indian Office circular No. 652, which states that the indorsement on all Indian checks must be made by a clear thumb imprint, witnessed by two persons who can write, giving address and occupation of such witnesses.

Yours respectfully,

JOHN A. BUNTIN,
Superintendent and Special
Disbursing Agent.

Mr. Goode: We also offer in evidence, letter dated January 29, 1913, as follows:

Department of the Interior,

United States Indian Service.

U. S. Indian Agency, Shawnee, Okla., Jan. 29, 1913.

The First National Bank of Douglas, Douglas, Ariz.

Gentlemen: In compliance with the act of Congress, approved Aug. 24, 1912, I transmit herewith the following list of checks drawn payable to the order of the individual owners who are members of the Mexican Kickapoo Indian Tribe, residing in the Republic of Mexico, for proper delivery:

* * * * * *

No. 892, Wah-pe-com-e, male, 22 years.....$60.00
No. 531379, Wah-puck-we-che, female, aged about 59 years 18.16
No. 216, Wah-puck-we-che, female, aged about 59 years 9.03

* * * * * *

Kindly acknowledge receipt of these checks on the
52 form herewith, in triplicate, and return for my files.

JOHN A. BUNTIN,
Superintendent and Special
Disbursing Agent.

Commissioner Indian Affair, Washington, D. C.

Mr. Goode: We now offer in evidence letter dated March 20, 1913, as follows:

Shawnee, Okla., March 20, 1913.

The First National Bank of Douglas, Douglas, Ariz.

Gentlemen: The following is a copy of a telegram I have received from Ah-kis-kuck, one of the leading members of the Mexican Kickapoo Indians residing in the Republic of Mexico:

"El Paso, Tex., March 19, 1913.

"John A. Buntin, Superintendent, Shawnee, Okla.

"Send all lease money to First National Bank, Douglas, Ariz., at once. Ah-kis-kuck."

Since these Indians are evidently on their way to your place to get their money, aand I believe them to be in great need, I again return you the checks, together with a number of others representing lease money collected since mailing you these checks on the 29th of January. In sending you these checks I wish to refer to copy of act of Congress quoted you in my letter of March 8, 1913, and assure you that I do not wish to annoy your bank in any way, but believe it is my duty, since I have been informed that these Indians are on the way, to comply with this act of Congress and do all in my power to aid in carrying this law and the wish of Congress successfully into effect. On account of this act of Congress and the extremely needy condition of these Indians. I will thank you to aid me in every possible way in carrying into effect the law quoted you in my letter of March 8.

The following is a list of the names of the Indians, their sex, and approximate ages, which will aid you in identifying these Indians. If there is any further description which can be furnished by this office which would aid you in identifying these Indians, I would be pleased to furnish it if called on to so do.

* * * * * *

Wah-pe-com-e, male, 22 years old	$60.00
Wah-pe-com-e, male, 22 years old	32.55
Wah-puck-we-che, female, 59 years old	18.16
Wah-puck-we-che, female, 59 years old	9.03
Wah-puck-we-che, female, 59 years old	30.00

* * * * * *

Yours respectfully,

JOHN A. BUNTIN,
Superintendent and Special
Disbursing Agent.

Mr. Goode: We also offer in evidence letter dated August 18, 1913, as follows:

Shawnee, Oklahoma, August 18, 1913.

The First National Bank of Douglas, Douglas, Ariz.

Gentlemen: I hand you herewith for proper delivery
53 checks drawn to the order of Mexican Kickapoo Indians living in Mexico, covering receipts of lease money

for these Indians since the sending the last list of checks to you for said Indians. This list of checks is sent to you, as you know, to meet the requirements of the act of Congress approved August 24, 1912.

* * * * * *

Wah-pe-com-e, check No. 976	$82.80
Wah-puck-we-che, check No. 987	30.00
Wah-puck-we-che, check No. 988	5.20

* * * * * *

All drawn on the Treasurer of the United States, dated August 15, 1913.

Please sign and return the enclosed receipt, in tripilcate, and very much oblige,

Yours respectfully,

JOHN A. BUNTIN,
Superintendent and Special
Disbursing Agent.

Mr. Goode: We also offer in evidence, letter dated January 3, 1914, as follows:

Shawnee Indian Agency.

Shawnee, Okla., Saturday, Jan. 3, 1914.

The First National Bank, Douglas, Ariz.

Gentlemen: In compliance with instructions from the honorable Commissioner of Indian Affairs, under date of November 29, 1913, I respectfully return to you for proper delivery, checks for Mexican Kickapoo Indians residing in the Republic of Mexico.

These checks are to be delivered in accordance with the provision of the act of Congress, approved August 24, 1912, a copy of which provision has been furnished you.

I give you a list of the names and approximate ages of the Indians to whom these checks are to be delivered. However, you will not always be able to select the Indian from the name of the Indian or Indians may give you as being the

person to whom the check should be delivered. The reasons for this is that in many cases the name which was taken probably 23 or 24 years ago was not spelled in such a manner as to truly represent the sounds composing the name.

The following is a list of the names, ages, sex, and amounts:

* * * * * *

Wah-pe-come-e, age 23, male	$32.50
Wah-puck-we-che, age 60, female	30.00
Wah-puck-we-che, age 60, female	5.20

* * * * * *

I have indicated the age and sex after each name in order to aid you in identifying these Indians.

This letter is written to you in quadruplicate. Please acknowledge receipt of the checks on the bottom of this letter and return three copies to me to be used in my accounts.

I am respectfully,

JOHN A. BUNTIN,
Superintendent and Special
Disbursing Agent.

Mr. F. H. Reily called on behalf of defendant.

54 Mr. F. H. Reily called on behalf of defendant, duly sworn, testifies:

I am the defendant. I have a deed for forty (40) acres of the land described. The deed was executed by Wa-pe-com-e and wife on May 20, 1930, and recorded the same day. At the time of my purchase there was an outstanding conveyance of one-half the royalty interest in the land. That deed was executed February 9, 1920, and recorded on February 14, 1929. There was also a farm lease of record to J. R. Eastman for 1931. At the time I bought the land half the royalty was gone and possession was gone until January 31, 1931. There was also an option to purchase of record to Ira L. Couch. It was dated October 22, 1929. About the first of the year or immediately thereafter I went out on the land in person and went over it several times. I did everything any person could do and took possession, there
55 is no house on it or anything, and made some improvements upon it. I leased the land. Mr. Craig

interfered with my possession. At that time I brought suit in the District Court of Pottawatomie County, Oklahoma, against Eggers as Superintendent of the Indian Agency, Mr. Craig and Edmister the Indian farmer and enjoined them with interferring with me in the possession of the land. I obtained a temporary order and later on no answer was filed, and I received a permanent injunction. I then brought suit in the Superior Court of Pottawatomie County, against Wa-pe-com-e and his wife to quiet title and determine heirship to this land, and obtained judgment quieting title and determining heirship. That is the judgment attached to my answer in this case. The citation in the injunction proceedings was dismissed. Exhibit 2 is carbon copy of permanent injunction obtained against J. F. Craig, Charles Eggers and Charles W. Edmister, and is as follows:

State of Oklahoma, Pottawatomie County—ss.

In the District Court thereof.

F. H. Reily, Plaintiff, vs. J. T. Craig, Charles Eggers and Charles W. Edmeister, Defendants. No. 13749.

Permanent Injunction.

Now on this the ..... day of December, 1930, the court being in due and lawful session and the defendants and each of them having been duly and lawfully summoned herein, as by law provided, and said defendants and each of them having failed to appear or plead in said action, are in default and are hereby adjudged to be in default.

The court being fully advised in the premises finds
56 that on the 6th day of August, 1894, the United States Government allotted to one Wah-puck-we-che, at that time an Indian in the Kickapoo Reservation, the West One-Half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10) North, Range Three (3) East of the Indian Meridian, in the then Oklahoma Territory, now the State of Oklahoma, containing eighty (80) acres of land.

The court further finds that Wah-puck-we-che is dead and that at the time of her death she was a resident of the Republic of Mexico; that she was an adult Kickapoo Indian and while she resided in Mexico she affiliated with the Mexican-Kickapoo Indians.

The court further finds that she died intestate and left as her sole surviving heir, Wa-pe-come-e, and that the said Wa-pe-com-e established his residence in the Republic of Mexico in the year 1906, prior to the death of his mother and that he resided there continuously for a period of more than ten years and that he was a member of the Kickapoo Indian Tribe and affiliated with said tribe.

The court further finds that the said Wa-pe-com-e was allotted, under certificate No. 42, by the United States Government a certain tract of land described as the West One-half (W½) of the Southwest Quarter (SW¼) of Section Fourteen (14), Township Twelve (12), Range One (1) East, located in Oklahoma County, State of Oklahoma.

The court further finds that on the 20th day of May, 1930, for a good and valuable consideration, the said Wa-pe-com-e as the sole and only heir of his mother, Wah-puck-we-che, sold and conveyed to the plaintiff herein, the West One-Half (W½) of the West One-Half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10) North, Range Three (3) East of the Indian Meridian, same being the original allottment allotted to Wah-puck-we-che, his mother.

The court further finds that the said plaintiff is the sole owner of said land by reason of said conveyance and that he went into possession thereof and that he is entitled to retain possession thereof as against the defendants or either of them.

The court further finds that the defendant, Charles
56 Eggers, is Superintendent of the Indian Agency at Shawnee, Oklahoma, and as such Superintendent has entered into a lease contract of said land with the defendant J. T. Craig and the defendant said J. T. Craig is attempting to take possession of said land and to deprive the plaintiff of his right of possession.

The court further finds that by reason of the premises that the United States Government has no authority over said land and that said land is unrestricted and was subject to be conveyed by the said Wa-pe-com-e without any interference upon the part of the said Charles Eggers or the said Charles W. Edmeister.

The court further finds that the said plaintiff is entitled to a permanent injunction enjoining the said defendants and each of them with interferring with him in his right of possession and control over said land.

It is therefore ordered, adjudged and decreed that you, the said J. T. Craig, Charles Eggers and Charles W. Edmeister are hereby permanently enjoined from going upon the West One-Half (W½) of the West One-Half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10), Range Three (3) East of the Indian Meridian, or interferring with the said plaintiff in his possession and control of said land or any part thereof.

It is further ordered, adjudged and decreed that the title to said land be, and the same is hereby confirmed in the said plaintiff.

It is further ordered that the plaintiff recover of and from the defendants and each of them, all costs in this behalf expended.

.....
Judge of the District Court.

O. K. ....., Attorney for Plaintiff.

O. K. ....., Attorney for Defendants.

Cross-Examination.

58 I rented the land about the first of February, 1931, and I took as much possession of the land as a man can take. I did this as soon as Atkeson's lease was up. I went out there about January 1. The royalty conveyance did not show on Mr. Phifer's records. I don't know whether it was approved by the Secretary or not. The lease I mentioned was signed by Wa-pe-com-e and J. R. Ephland. The purchase option was signed by Wa-pe-com-e. It does not show approval by the Secretary or the Agency. I took a deed to this land from Wa-pe-com-e and wife on May 20, 1930, and recorded it the same day. Ma-ka-se-a and Tom Johnson made affidavits at the time. The deed and affidavits were made and executed in my office before my stenographer. Ma-ka-se-a and Tom Johnson were not paid any money for making the affidavits. I did not know Wah-puck-we-che. I learned she died a couple of years before I took the deed. She was merely here on a visit from Mexico, had her home and personal property there. I bought out Ephland's lease from him.

Defendant rests.

Thereupon the court made the following announcement:

The Court: There is no question but what she was a resident of Mexico and the court will have to find she was a resident of Mexico at that time, and the court will find he has been a resident of Oklahoma for twelve (12) years.

Thereupon the cause was argued by counsel for plaintiff and defendant and at the conclusion thereof the court denied plaintiff's application for an injunction in this cause, and to which action and ruling by the court the plaintiff excepted at the time.

State of New Mexico, County of Santa Fe—ss.

I, Nettie V. Belles, do certify that I am official court reporter for the United States District Court for the District of New Mexico, and that I was in attendance on a term of court held at Oklahoma City, Oklahoma, during the
59 month of February, 1931, when Judge Colin Neblett was presiding over such term of court, under assignment of Hon. Robert E. Lewis, Senior Circuit Judge, and that I acted as reporter during the trial of cause No. 1192, Equity, United States of America vs. F. H. Reily.

I further certify that the foregoing 40 pages of typewritten matter is a true and complete transcript of my notes taken at such hearing.

I further certify that I am not related to any of the parties, nor interested in the result thereof.

NETTIE V. BELLES, Court Reporter.

Santa Fe, New Mexico, July 30, 1931.

Thereupon, on the 25th day of February, 1931, the court signed and caused to be filed in this cause the following Journal Entry of Judgment herein, viz.:

Decree.

This cause came on to be heard at this term and was argued by counsel, and thereupon the following findings of fact and conclusions of law were made and entered:

Findings of Fact.

1. The court finds that the West One-Half (W½) of the Northeast Quarter (NE¼) of Section Nine (9), Township Ten (10), Range Three (3) East of the Indian Meri-
60 dian, containing eighty (80) acres more or less, located in Pottawatomie County, Oklahoma, was allotted to Wah-puck-we-che, as a member of the Kickapoo Tribe of Indians and that her allotment number was 225.

2. That the said allottee died in January, 1929, and left as her sole and only heir, Wa-pe-com-e, her son, and the said Wa-pe-com-e inherited said land.

3. That said Wah-puck-we-che and Wa-pe-com-e left Oklahoma and went to old Mexico in the year 1903 and each of said persons were adults and resided there many years and after the passage of the act of June 21, 1906. That each of said Indians became non-residents of the United States within the meaning and purview of the Act of June 21, 1906.

That the said Wah-puck-we-she returned to the United States in the year 1927 and died in Oklahoma, but was a resident of old Mexico at the date of her death.

4. That the said Wa-pe-com-e returned to the United States about the year 1920 and has resided in the United States since said date. That the said Wa-pe-com-e as the sole heir of Wah-puck-we-che deceased, conveyed the West One-Half (W½) of the West One-Half of the Northeast Quarter (NE¼) of Section Nine (9) Township Ten (10) North, Range Three (3) East of the Indian Meridian, containing forty (40) acres, by warranty deed dated the 20th day of May, 1930.

That Charles Eggers, United States Superintendent of the Shawnee Agency entered into an agricultural lease with J. T. Craig on the 8th day of October, 1930, leasing said land on behalf of the undetermined heirs of the said Wah-puck-we-che, for the year 1931. That the said F. H. Reily filed suit in the District Court of Pottawatomie County, and obtained a permanent injunction against the said J. T. Craig, Charles Eggers, United States Superintendent and Charles W. Edmeister, United States Indian Farmer, restraining and

enjoining them from interferring with said Reily's possession in and to said forty acres of land.

That thereafter he filed suit in the Superior Court of Pottawatomie County and obtained a judgment quieting his title in and to said land against any claims of the said
61 Wa-pe-com-e. That thereafter this suit was brought in this court to restrain the said Reily and his tenants from occupying said land or interferring with the use and occupation thereof.

Conclusions of Law.

1. The court finds as a matter of law that neither of the judgments rendered in the State court and plead by the said F. H. Reily, or the proceedings had there are barred by this action, or in any way prevent this court from entertaining this suit.

2. That upon the death of Wah-puck-we-che the said Wa-pe-com-e became vested with full power and right to convey any and all of said land and to pass good title thereto, free, clear and discharge of and from any supervision and control by the United States, and the conveyance made by the said Wa-pe-com-e to F. H. Reily, conveyed good title to the West One-Half of the West One-Half of the Northeast Quarter of Section Nine, Township Ten North, Range Three East of the Indian Meridian.

It is therefore by the court, considered, ordered and adjudged, that the plaintiff and those for and on whose behalf this action was brought, have no right, title, interest or claim in or to said land or any part thereof, and that this Bill be dismissed. Exceptions allowed the complainant.

COLIN NEBLETT, Judge.

It is hereby stipulated and agreed, by and between the parties in the above action, through their respective attorneys, that the above and foregoing statement of the evidence in narrative form contains all the evidence material to the plaintiff's assignments of errors and all the exceptions of the parties upon the trial of the above action in the United States District Court for the Western District of Oklahoma, and

that the same be approved by the court as the full,
62 true and complete statement of the evidence in this cause, and the same be lodged and filed with the Clerk of this Court upon such approval.

Dated, Oklahoma City, Oklahoma, December 23rd, 1931.

WILLIAM EARL WILES,
Assistant United States Attorney,
Attorney for Plaintiff.

MARK GOODE,
CHAS. E. DEICKER,
JOHN L. GOODE,
Attorneys for Defendant.

Service of the foregoing accepted this 23rd day of December, 1931, and further notice of time or place for the examination thereof, or for the presentation thereof for approval are waived, and we consent to the approval and filing thereof as a full, true and condensed statement of the evidence in said cause.

Witness my hand this 23 day of December, 1931.

MARK GOODE,
Attorney for Appellee.

Upon the foregoing stipulation and consent of the attorneys for the respective parties herein, it is hereby ordered, that the foregoing is a full, true and complete statement of the evidence in narrative form of said District Court in the above action, containing all the evidence material to the plaintiff's assignments of errors and all the exceptions of the parties upon the trial, and I approve the same and direct the same be filed as the approved statement of the evidence in said cause.

Dated, Jan. 2nd, 1932.

COLIN NEBLETT,
United States District Judge,
Trial Judge.

Endorsed: Filed in District Court on Jan. 13, 1932.

Petition for Appeal.

To the Honorable Edgar S. Vaught, District Judge:

The above named plaintiff, the United States of
63 America, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of February, A. D. 1931, does hereby appeal from said decree to the Circuit Court of Appeals for the Tenth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Tenth Circuit, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required be made.

THE UNITED STATES OF AMERICA,
By ROY ST. LEWIS,
United States Attorney,

WILLIAM EARL WILES,
Assistant United States Attorney,
Solicitors for Plaintiff.

Appeal allowed. No bond required of the United States of America. Plaintiff given ninety (90) days in which to prepare and file bill of exceptions, transcript and record on appeal.

HC EDGAR S. VAUGHT, Judge.

Endorsed: Filed in District Court on May 15, 1931.

Assignment of Errors.

Now comes the plaintiff in the above entitled cause,
64 the United States of America, and files the following assignment of errors upon which it will rely upon the prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the 25th day of February, A. D. 1931.

(1)

That the United States District Court for the Western District of Oklahoma erred in finding and determining the heirship of Wah-puck-we-che and that Wah-pe-com-e was her sole and only heir, because such power and function is vested by Acts of Congress solely in the Secretary of the Interior.

(2)

That the United States District Court for the Western District of Oklahoma erred in its findings and conclusions of law entered herein that the defendant had power or could in any manner litigate with plaintiff the title and right to the custody and control of the lands involved in this action prior to a legal determination of the heirship of Wah-puck-we-che, the allottee thereof, by the Secretary of the Interior as provided for by Acts of Congress in such matters.

(3)

That the United States District Court for the Western District of Oklahoma erred in finding that Wah-pe-com-e was non-resident in the United States within the meaning
65 and purview of the Act of June 21, 1906.

(4)

That the United States District Court for the Western District of Oklahoma erred in its conclusions of law herein in concluding as a matter of law that Wah-pe-com-e upon the death of Wah-puck-we-che became vested with the title to the lands involved herein with right and power in him to convey the same free from the control of the plaintiff, and that the conveyance by him to the defendant on May 20th, 1930, was a valid conveyance of said lands.

(5)

That the United States District Court for the Western District of Oklahoma erred in its conclusions of law and order entered herein that the plaintiff, the United States of America, and those for or on whose behalf this action was brought, have no right, title, interest or claim in and to the lands in this action.

(6)

That the United States District Court for the Western District of Oklahoma erred in finding the facts in favor of the defendant and against the plaintiff, because such findings are not supported by the evidence in the case but are contrary to the evidence and the weight thereof in the case.

(7)

That the United States District Court for the Western District of Oklahoma erred in its conclusions of law in favor of the defendant because the same are contrary to the law in and applicable in the case.

(8)

That the United States District Court for the Western District of Oklahoma erred in dismissing the bill of complaint of plaintiff.

(9)

That the United States District Court for the Western District of Oklahoma erred in denying the relief prayed for by plaintiff in its bill of complaint, and in refusing to
66 grant plaintiff relief by injunctive process against defendant as in said bill prayed for.

(10)

That the United States District Court for the Western District of Oklahoma erred in not making and entering its findings and conclusions of law in favor of the plaintiff under the law and evidence in the case.

(11)

The United States District Court for the Western District of Oklahoma erred in its decree because upon its face it shows it to have been entered for the wrong party and should have been made and entered for the plaintiff.

Wherefore, the Appellant prays that said decree be reversed and that said District Court for the Western District of

Oklahoma be ordered to enter a decree reversing the decision of the lower court in said cause.

THE UNITED STATES OF AMERICA,
By ROY ST. LEWIS,
United States Attorney,

WILLIAM EARL WILES,
Assistant United States Attorney,
Attorneys for Appellant.

Endorsed: Filed in District Court on May 15, 1931.

Stipulation in Lieu of Praecipe.

67 It is hereby stipulated by and between counsel for the respective parties hereto that the transcript of the record on appeal herein shall consist of the following:

(1) Bill of Complaint with filing date thereof.

(2) Order of the Court for temporary restraining order and the Marshal's return thereon, with filing date.

(3) The chancery subpoena with the Marshal's return thereon with filing date.

(4) Answer of F. H. Reily, together with exhibits thereto attached, and filing date thereof.

(5) Order of Court denying temporary injunction and order setting case for trial.

(6) Decree of the Court and filing date thereof.

(7) Petition for appeal and order of allowance of appeal, with filing date thereof.

(8) The assignments of errors with filing date thereof.

(9) Notice of appeal and acceptance thereof, and filing date.

(10) The citation and acceptance thereof, with filing date.

(11) The approved narrative statement of the evidence and filing date.

(12) The various orders of the Court extending the times in which to prepare and file narrative statement of the evidence, together with the various orders of the Court extending the times in which to file and docket the case in the Circuit Court of Appeals.

(13) This stipulation in lieu of praecipe [redacted] filing date.

(14) The Clerk's certificate to transcript of record.

Said transcript so prepared to be transmitted to the Circuit Court of Appeals for the Tenth Circuit, in pursuance to the appeal heretofore taken in this case, and to include
68 the foregoing items.

Dated January 14th, 1932.

WILLIAM EARL WILES,
Assistant United States Attorney for the Western District of Oklahoma and Attorney for the Plaintiff.

MARK GOODE,
CHARLES E. DIERKER,
JOHN L. GOODE,
Attorneys for Defendant.

Endorsed: Filed in District Court on Jan. 15, 1932.

(Clerk's Certificate to Transcript.)

United States of America, Western District of Oklahoma—ss.

I, Thedore M. Filson, Clerk of the District Court of
69 the United States for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 1192, Equity, wherein The United States of America, is complainant, and F. H. Reily, is defendant, as full, true and complete as the said transcript purports to contain and as called for by the praecipe for transcript of the record above set forth.

I further certify that the original citation is attached hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Oklahoma City, in said District, this 26th day of January, A. D. 1932.

THEODORE M. FILSON, Clerk,
By GRACE G. BUTLER, Deputy.

Filed Jan. 28, 1932. Albert Trego, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Appearances

For appellee

The clerk will enter my appearance as counsel for the appellee.

MARK GOODE,
Shawnee, Okla.
CHARLES E. DIERKER,
Shawnee, Okla.
JOHN L. GOODE,
Shawnee, Okla.

Filed Feb. 5, 1932. Albert Trego, clerk.

Order of submission

Forty-fifth day, April term, Wednesday, September 7th, A.D. 1932. Before Honorable Robert E. Lewis, Honorable John H. Cotteral, and Honorable Orie L. Phillips, Circuit Judges.

612

UNITED STATES OF AMERICA, APPELLANT

vs.

WALLACE ESTILL ET AL., APPELLEES

Appeal from the District Court of the United States for the Western District of Oklahoma.

613

UNITED STATES OF AMERICA, APPELLANT

vs.

F. H. REILY, APPELLEE

Appeal from the District Court of the United States for the Western District of Oklahoma.

These causes came on to be heard and by agreement of counsel were argued together, William Earl Wiles, Esquire, appearing for appellant in both cases; Marke Goode, Esquire, appearing for appellees; Wallace Estill et al.; and F. H. Reily, appellee, appearing pro se.

Thereupon these causes were submitted to the court..

Opinion

No. 613, September term, 1932

(December 23, 1932)

Mr. William Earl Wiles, assistant United States attorney (Mr. Herbert K. Hyde, United States attorney, was with him on the brief), for appellant.

Mr. F. H. Reily (Messrs. Goode, Dierker & Goode and Messrs. Reily & Reily were with him on the brief), for appellee.

Before LEWIS, COTTERAL and PHILLIPS, Circuit Judges.

LEWIS, Circuit Judge, delivered the opinion of the court.

The issue of law that we decided this day in case No. 612, United States v. Wallace Estill, et al., is again presented in this case. In this case, as in that one, the United States sues as trustee, named as such in the patent issued under the General Allotment Act of February 8, 1887, 24 Stat. 388. The eighty acres therein described as situate in the Territory (now State) of Oklahoma was allotted to Wah-puck-we-che, a Kickapoo Indian, who later went to the Republic of Mexico in 1903, took her son, Was-pe-com-e, of tender years with her, and resided there with other Kickapoos under tribal customs. In 1927 or 1929 she returned to Oklahoma and died there. Her son was his mother's only heir. When he grew up, he returned to Oklahoma, where he remained. After his mother's death he went to Mexico and brought away her household goods and personal belongings. He was an allottee of Oklahoma lands in his own right. In May, 1930, he sold forty acres of his mother's allotment to appellee, Reily, for $1,500.00 "and other good and valuable consideration." Notwithstanding this, appellant's local representatives gave a lease on the whole eighty acres for the calendar year 1931, and dispute arose between Reily and their tenant over possession of the forty acres that Reily had purchased. Reily obtained a decree in the State court confirming his title and enjoining interference with his possession, by appellant's local representatives and their tenant. They ignored the suit against them and the injunctive order. Then the United States brought this suit to enjoin Reily's interference with the asserted right of the local representatives to lease the forty acres and the claimed right of their tenant to exclusive possession. The bill was dismissed on final hearing. Applying the act of June 21, 1906, quoted in the Estill case, to the facts of this case, which are not substantially different from the facts in United States v. Estill, supra, the decree appealed from should be affirmed. It is so ordered.

Decree

Thirty-eighth day, September term, Friday, December 23rd, A.D. 1932.

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed.

No. 613

In the United States Circuit Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA, APPELLANT

vs.

F. H. REILY, APPELLEE

Petition for Rehearing

Comes now the appellant herein, the United States of America, by their attorneys, Herbert K. Hyde, United States attorney for the Western District of Oklahoma, and William Earl Wiles, assistant United States attorney, and respectfully petitions this honorable court to vacate and set aside the decision and opinion of this court rendered herein on the 23rd day of December 1932, and to grant to appellant a rehearing of this cause, and that the same may be re-argued by counsel, and for reasons therefor respectfully shows to the court the following:

(1)

This court in said decision on page 2 thereof says:

"Applying the act of June 21, 1906, quoted in the Estill case, to the facts of this case, which are not substantially different from the facts in United States v. Estill, supra, the decree appealed from should be affirmed."

(2)

We most respectfully believe the court has overlooked an important and decisive difference between the evidence in this case and that of United States v. Estill, mentioned.

It is true that Wah-puck-we-che, the allottee, in this case, and Mah-no-ne-mah, the allottee in the Estill case, were both non-resi-

dents in the United States. In this case Wah-pe-com-e was the heir of Wah-puck-we-che and for a period of time up to 1920 prior to her death—1920—was a non-resident himself, but at the time of her death, he was not non-resident. In the Estill case I-nesh-kin, as surviving widow of Mah-no-ne-mah, inherited a one-half share in his lands, and she at the time and for some time thereafter was non-resident in the United States. Upon her death, some of her remote heirs—part of the Johnson children—conveyed their inherited interests. It will thus be seen that I-nesh-kin was vested with an inherited interest while also non-resident. In this instant case, Wah-pe-come-e during the period of his non-residence possessed no inherited interest in his mother's allotment because she was living during all that time, and as said in 18 Corpus Juris, page 862:

"No one can be an heir of a living person; and, before the death of the ancestor, an expectant heir has no interest or estate in, or rights or standing as to property which he may subsequently inherit."

Note 94, citing in re Barnes, 47 Okla. 117, 120, 147 Pac. 451. His only interest became vested in him at his mother's death, and he was not at that time or any time since nonresident in the United States.

We respectfully believe these differences in the facts in these two cases make an essential difference in applying the act of June 21, 1906. It seems to us that there should be a concurrence of an inherited interest with nonresidence—not necessarily coinciding in time with each other—but nevertheless while nonresident—in order to remove the restrictions under said act.

Wherefore, petitioner most respectfully prays this honorable court to grant a rehearing in this cause, and to permit the same to be re-argued by counsel, and in the meantime that the mandate herein be stayed.

Respectfully submitted.

HERBERT K. HYDE,
United States Attorney,
WILLIAM EARL WILES,
Assistant United States Attorney,
Attorneys for Petitioner.

STATE OF OKLAHOMA,
Western District of Oklahoma, ss:

William Earl Wiles, of lawful age, being first duly sworn, does hereby certify that he is attorney for petitioner herein, and that this petition is made in good faith and not for the purpose of vexation or delay.

WILLIAM EARL WILES.

Subscribed and sworn to before me this 17th day of January, 1933.

GLENN H. GRUBB,
Deputy Clerk of United States District Court,
Western District of Oklahoma.

(Indorsed:) Filed Jan. 21, 1933. Albert Trego, clerk.

Order

Fourteenth day, January term, Tuesday, January 24th, A. D. 1933.

Before Honorable Robert E. Lewis, Circuit Judge, Honorable Orie L. Phillips, Circuit Judge, and Honorable Tillman D. Johnson, District Judge.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

(On February 4th, 1933, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and decree of said court, was issued to the United States District Court and on February 8th, 1933, the receipt of the clerk of the said District Court for said mandate was received and filed.)

Clerk's certificate

United States Circuit Court of Appeals, Tenth Circuit

I, Albert Trego, clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Oklahoma, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals wherein United States of America was appellant and F. H. Reily was appellee, no. 613, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the city of Denver, Colorado, this 3rd day of April, A. D. 1933.

ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals,
Tenth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

F. H. REILY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above-entitled cause on December 23, 1932 (R. 57), affirming a decree of the District Court for the Western District of Oklahoma dismissing the Government's bill of complaint (R. 20–22).

OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law appear at R. 47–48. The opinion of the Circuit Court of Appeals (R. 56) is reported in 62 F. (2d) 621.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 23, 1932 (R. 57). Petition for rehearing was denied January 24, 1933 (R. 59). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the Act of June 21, 1906, p. 9, *infra*, removed the restrictions upon the alienation of the allotted land of a Mexican Kickapoo Indian who resided in Mexico at the time of and after the passage of that Act.

(2) Whether the Act of June 21, 1906, removed the restrictions upon the alienation of the inherited land of a Kickapoo Indian who at the time of the inheritance and at all times thereafter was a resident of the United States.

STATUTE INVOLVED

That portion of the Act of June 21, 1906, c. 3504, 34 Stat. 325, 362, relative to this case is set forth in Appendix A, p. 9, *infra*.

STATEMENT

This is an action in equity by the United States to restrain the respondent from interfering with the leasing and managing of and from trespassing upon certain Indian lands held in trust by the United States (R. 1–3). The bill of complaint

alleged that the United States was the owner of a certain quarter-section of land located in Pottawatomie County, Oklahoma, which land was held in trust for the benefit of the heirs of Wah-puck-we-che, a deceased allottee of the Mexican Kickapoo Tribe of Indians; that on October 18, 1930, the United States, through the Indian Superintendent, leased the land in question to one Craig, who entered thereupon and was in possession thereof; that the respondent, claiming some right in the land, had filed a suit for an injunction in a State court against the Superintendent and the lessee seeking to enjoin them from exercising any right with respect to the leasing, management, or possession of the land; that the respondent had unlawfully entered upon and was trespassing upon the land; and prayed that the respondent be enjoined from interfering with the leasing and managing thereof by the United States (R. 1–3).

The respondent filed an answer (R. 6–11) in which he alleged that on May 20, 1930, he had purchased the land from Wa-pe-com-e, the sole heir of Wah-puck-we-che. The answer set forth a deed from Wa-pe-com-e (R. 11–12) and alleged that the deed was valid and that Wa-pe-com-e had the right to convey the land to the respondent. The answer admitted the alleged interference by the respondent with the leasing, management, and possession of the land (R. 6–10).

After a trial, the District Court made findings of fact and conclusions of law (R. 47–48). The court found that the land in question was allotted to Wah-puck-we-che as a member of the Kickapoo Tribe of Indians; that the said allottee died in January, 1929 and that Wa-pe-com-e, her only son and heir, inherited the land; that Wah-puck-we-che and Wa-pe-com-e left Oklahoma and went to Mexico in 1903 and resided there for many years and after the passage of the Act of June 21, 1906; that Wa-pe-com-e returned to the United States about the year 1920 and has resided in the United States since that date; that Wah-puck-we-che returned to the United States in 1927 and died in Oklahoma; that on May 20, 1930, Wa-pe-com-e, as the sole heir of Wah-puck-we-che, conveyed the land to the respondent Reily (R. 47–48).

The District Court also found that the United States Superintendent of the Shawnee Indian Agency leased the land in question to Craig on October 8, 1930, on behalf of the undetermined heirs of Wah-puck-we-che, and that the respondent had obtained a permanent injunction in the District Court of Pottawatomie County against the Superintendent and Craig restraining and enjoining them from interfering with respondent's possession of the land.

Upon these findings the District Court held that upon the death of Wah-puck-we-che, Wa-pe-com-e became vested with power to convey the land free from any supervision by the United States, and

that the deed from Wa-pe-com-e to the respondent conveyed to the latter a good title. The District Court thereupon ordered that the bill of complaint be dismissed, and decreed that the United States, and those on whose behalf the bill of complaint was brought, had no right or interest in the land (R. 48). Upon appeal, the decree of the District Court was affirmed by the Circuit Court of Appeals (R. 57), and thereafter a petition for a rehearing was denied (R. 59).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the land in question was free from the statutory restrictions against its alienation at the time of its alleged conveyance to the respondent;

(2) In holding that upon the death of the allottee her sole heir, Wa-pe-com-e, became vested with full and unrestricted power to convey the land to the respondent;

(3) In affirming the decree of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is probably erroneous.

The Indian Appropriation Act of June 21, 1906, p. 9, *infra,* provided in part as follows:

> All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita

> Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: * * *

In order to give meaning to the proviso to the statute above quoted, it is necessary to construe the words "inherited and otherwise", used in the statute, as not including land held at the time of the Act by virtue of an *allotment.* The statute has been so construed in *Johnson* v. *United States,* 283 Fed. 954 (C.C.A. 8th), where the court said (p. 956):

> when the whole paragraph is read with a view of sustaining it in all its parts the word "otherwise," in the second line, seems to be in contradistinction to allotment, so that it was clearly intended that all restrictions as to sale and incumbrance of lands, inherited or otherwise acquired (except allotments of surviving allottees), were removed under the conditions named.

If the foregoing is a correct construction of the statute, then the residence in Mexico of the allottee Wah-puck-we-che after the passage of the Act of June 21, 1906, did not operate to remove the re-

strictions upon the alienation of the allotted land and, accordingly, the land remained subject to such restrictions at the time of her death. (See the Act of February 8, 1887, c. 119, 24 Stat. 388, 389, as amended (U.S.C., title 25, sec. 348).)

Nothing happened upon or after her death to change the status of the land. Wa-pe-com-e was the sole heir. He lived in Mexico with his mother until about 1920, when he returned to the United States where he has since resided. When he resided in Mexico he had no interest in the land, since his mother was still alive. When the land descended to him by inheritance, he was residing in the United States. Accordingly, when Wa-pe-com-e acquired the land by inheritance, he was not a nonresident of the United States and the statute did not operate to remove the restrictions thereon. Since the land was subject to the statutory restrictions at the time of its attempted conveyance by Wa-pe-com-e to the respondent Reily, such conveyance was wholly invalid.

The Circuit Court of Appeals did not discuss the legal questions involved, but said (R. 56) that the instant case was not substantially different from *United States* v. *Estill,* 62 F. (2d) 620, a case which had just been decided by the Circuit Court of Appeals, a copy of the opinion in which case appears in Appendix B, pp. 11–13, *infra.* But in the *Estill case* both the District Court and the Circuit Court of Appeals found as a fact that the Indian heirs in question resided in Mexico *after the*

passage of the Act of June 21, 1906, and after they had inherited the land in question. The Government does not question the correctness of the decision of the court below in the *Estill case* but contends that the two cases are distinguishable upon their facts.

The construction of the statute sought by the Government is in harmony with the rule that doubtful legislation is to be construed in favor of the Indians (*Worcester* v. *Georgia*, 6 Pet. 515, 582; *United States* v. *Celestine*, 215 U.S. 278, 290).

2. The question presented is one of importance in the administration of the statute involved. We are advised by the Department of the Interior that the decision of the Circuit Court of Appeals in the instant case will affect the title to land now held or formerly held by a considerable number of Indians of the various tribes mentioned in the statute. Moreover, the question presented is of importance because of its bearing upon the right of the State of Oklahoma to levy taxes upon lands similar to those here involved; the right of the State to impose a tax depends, of course, upon whether or not allotted lands, such as those here involved, remain subject to the statutory restrictions. *United States* v. *Rickert*, 188 U.S. 432; *Goudy* v. *Meath*, 203 U.S. 146.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1933.

APPENDIX A

ACT OF JUNE 21, 1906, C. 3504, 34 STAT. 325, 362 363

That the Secretary of the Interior be, and he hereby is, directed to immediately cause to be paid to those Kicking Mexican Kickapoo allottees, who under the Act of Congress of March third, eighteen hundred and ninety-three, elected to leave in the Treasury their share of the funds provided for in Article V of said Act, the sum of money to their credit, together with interest thereon, as provided by said Act, and as also provided by the Act of June tenth, eighteen hundred and ninety-six; the shares of minors to be paid to the parents or next of kin having the care and custody of said minors, the shares of deceased persons to be paid to their heirs; all of said payments to be made upon claim through the First National Bank or the Border National Bank, of Eagle Pass, Texas, except that the Kickapoos now residing in Oklahoma may receive their shares through the United States Indian agent at Shawnee, Oklahoma, if they so desire; and for the purpose of carrying this provision into effect there is hereby appropriated the sum of forty thousand dollars, or so much thereof as may be necessary, out of any funds in the Treasury of the United States not otherwise appropriated, the same to be immediately available.

All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo,

and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided*, That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: *Provided further*, That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee.

APPENDIX B

United States Circuit Court of Appeals Tenth Circuit

No. 612—September Term, 1932

United States of America, appellant

vs.

Wallace Estill, Joe S. Ellis, A. F. Nowakoski, Mary Nowakoski, The Federal National Bank of Shawnee, Oklahoma, a Corporation, appellees

---

Appeal from the District Court of the United States for the Western District of Oklahoma

---

(December 23, 1932)

Before *Lewis, Cotteral,* and *Phillips,* Circuit Judges.

Lewis, *Circuit Judge,* delivered the opinion of the court.

This suit was brought by the United States to quiet title to eighty acres of land in Oklahoma that had been alloted in 1894 to Mah-no-ne-mah, a Kick-

apoo Indian. The United States had title in trust for the sole use of Mah-no-ne-mah and his heirs under the provisions of the fifth section of the General Allotment Act of February 8, 1887 (24 Stat. 388). Mah-no-ne-mah went to the Republic of Mexico to reside, as did many of the Kickapoos, and he died there in 1905. This suit was brought in the interest of his heirs. He left surviving him as his sole heirs his widow, I-nesh-kin, and a son, Pah-ko-che-pe-ta, by his divorced wife, Nah-she-pe-eth. The defendants Nowakoski, appellees here, are remote grantees of remote heirs of Mah-no-ne-mah. The defendant bank disclaimed. The other defendants are Nowakoski's mortgagees.

The inquiry is whether the facts bring this case within the terms of the Act of June 21, 1906 (34 Stat. 363), removing restrictions as to sale of the eighty acres. The Act so far as material reads thus:

> All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: * * *.

It will be observed that Mah-no-ne-mah was not living when the Act was passed. He died in April of the preceding year, but his widow, I-nesh-kin, who inherited an undivided half interest in the eighty acres, was living on June 21, 1906, and she was a Kickapoo allottee. Likewise as to Nah-she-pe-eth, the divorced wife of Mah-no-en-mah. Their

son, Pah-ko-che-pe-ta, had died within a year after his father's death, and his mother inherited his half interest in the eighty; and she too was on June 21, 1906, an adult Kickapoo allottee. The lower court also found, and the proof sustains it, that I-nesh-kin and Nah-she-pe-eth "were adults and residing in the Republic of Mexico on the twenty-first day of June, 1906, and thereafter."

It should be said an undivided four-ninetieths interest in the eighty acres was acquired from a minor heir of I-nesh-kin through proceedings in partition in the state court in 1930, in which the whole eighty was sold for $4,000.00, its appraised value.

On June 21, 1906, I-nesh-kin and Nah-she-pe-eth held full title to Mah-no-ne-mah's allotment, and the Act removed all restrictions as to its sale and incumbrance on the facts stated. See *Johnson* v. *United States*, 283 Fed. 954.

The decree appealed from dismissing the bill is affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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10612—33——1

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 31

UNITED STATES OF AMERICA, PETITIONER

v.

F. H. REILY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law appear at Record, pp. 47–48. The opinion of the Circuit Court of Appeals (R. 56) is reported in 62 F. (2d) 621.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 23, 1932 (R. 57). Petition for rehearing was denied January 24, 1933 (R. 59). Petition for certiorari was filed April 22, 1933. Certiorari was granted May 29, 1933 (R. 61).

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Act of June 21, 1906, c. 3504, 34 Stat. 325, 363, removed the restrictions upon the alienation of the allotted land of a Kickapoo Indian who resided in Mexico at the time of and after the passage of that Act.

2. Whether the said Act of June 21, 1906, removed the restrictions upon the alienation of the inherited land of a Kickapoo Indian who *at the time of the inheritance, and at all times thereafter,* was a resident of the United States.

STATUTES INVOLVED

The pertinent provisions of the Act of June 21, 1906, c. 3504, 34 Stat. 325, 363, read as follows:

> All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding

five years: *Provided further,* That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee.

Other statutory provisions bearing upon the questions presented will be referred to in the argument.

STATEMENT

This suit was brought by the United States to enjoin and restrain the respondent from interfering with the leasing and managing of, and from trespassing upon, certain Indian lands held in trust by the United States (R. 1, 3). The bill of complaint alleged that the United States was the owner of a certain quarter section of land located in Pottawatomie County, Oklahoma, which land was held in trust for the benefit of the heirs of Wah-puck-we-che, a deceased allottee of the Mexican-Kickapoo Tribe of Indians; that on October 18, 1930, the United States, through the Indian Superintendent, leased the land in question to one Craig, who entered thereupon and was in possession thereof; that the respondent, claiming some right in the land, had filed a suit for an injunction in a State court against the Superintendent and the lessee, seeking to enjoin them from exercising any right with respect to the leasing, managing, or possession of the land; that the respondent had unlawfully entered upon and was trespassing upon the land;

and prayed that the respondent be enjoined from interfering with the leasing and managing thereof by the United States (R. 1, 3).

The respondent filed an answer (R. 6, 11), in which he alleged that on May 20, 1930, he had purchased the land from Wa-pe-com-e, the sole heir of Wah-puck-we-che. The answer set forth a deed from Wa-pe-com-e (R. 11–12) and alleged that the deed was valid and that Wa-pe-com-e had the right to convey the land to the respondent. The answer admitted the alleged interference by the respondent with the leasing, managing, and possession of the land (R. 6, 10).

After trial the District Court made findings of fact and conclusions of law (R. 47, 48). The court found that the land in question was allotted to Wah-puck-we-che as a member of the Kickapoo Tribe of Indians; that the said allottee died in January 1929, and that Wa-pe-com-e, her only son and heir, inherited the land; that Wah-puck-we-che and Wa-pe-com-e left Oklahoma and went to Mexico in 1903; that both of said Indians were then adults and resided in Mexico many years and after the passage of the Act of June 21, 1906; that Wa-pe-com-e returned to the United States in the year 1920, and has resided in the United States since that date; that Wah-puck-we-che returned to the United States in 1927 and died in Oklahoma, but was a resident of Mexico at the date of her death; that on May 20, 1930, Wa-pe-com-e, as the sole heir

of Wah-puck-we-che, conveyed the land to the respondent Reily (R. 47, 48).

The District Court also found that the United States Superintendent of the Shawnee Indian Agency leased the land in question to Craig, on October 8, 1930, on behalf of the undetermined heirs of Wah-puck-we-che and that the respondent had obtained a permanent injunction in the District Court of Pottawatomie County against the Superintendent and Craig, restraining and enjoining them from interfering with respondent's possession of the land; that thereafter he filed suit in the Superior Court of Pottawatomie County and obtained a judgment quieting his title in and to said land against any claims of the said Wa-pe-com-e (R. 47, 48).

Upon this finding the District Court held that upon the death of Wah-puck-we-che, Wa-pe-com-e became vested with power to convey the land free from any supervision by the United States, and that the deed from Wa-pe-com-e to the repondent conveyed to the latter a good title. The District Court thereupon ordered that the bill of complaint be dismissed, and decreed that the United States and those on whose behalf the bill of complaint was brought had no right or interest in the land (R. 48). Upon appeal the decree of the District Court was affirmed by the Circuit Court of Appeals (R. 57) and thereafter a petition for a rehearing was denied (R. 59).

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the land in question was free from the statutory restrictions against its alienation at the time of its alleged conveyance to the respondent;

(2) In holding that upon the death of the allottee, the sole heir, Wa-pe-com-e, became vested with full and unrestricted power to convey the land to the respondent;

(3) In affirming the decree of the District Court.

SUMMARY OF ARGUMENT

I

The Act of June 21, 1906, did not operate to remove the restrictions upon the alienation of the allotted lands, and the allottee as such could no more sell or encumber the same "after" than she could have done "prior" to the passage of said Act.

II

The Act of June 21, 1906, did not operate to remove restrictions upon the alienation of the inherited lands unless the heir was a nonresident of the United States at the time of the allottee's death, or became such a nonresident of the United States thereafter.

III

The repealing Act of February 17, 1933, c. 97, 47 Stat. 819, has no application to the controversy involved in this case.

ARGUMENT

I

THE ACT OF JUNE 21, 1906, DID NOT OPERATE TO REMOVE THE RESTRICTIONS UPON THE ALIENATION OF THE ALLOTTED LANDS, AND THE ALLOTTEE AS SUCH COULD NO MORE SELL OR ENCUMBER THE SAME "AFTER" THAN SHE COULD HAVE DONE "PRIOR" TO THE PASSAGE OF SAID ACT

The correct answers to the questions presented depend upon a correct interpretation of the Act of June 21, 1906. The pertinent provisions of that Act are quoted below for convenience (34 Stat. 363):

> *All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians,* and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians *now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: *Provided further,* That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee.

From an examination of the above quotation from the Act of 1906 it will be observed that the word "allottee" does not occur in the body of the Act, but is used only in the provisos. The body of the Act provides for the removal of "all restrictions as to sale and incumbrance of all lands, *inherited and otherwise*, of all adult Kickapoo Indians, * * * now or hereafter nonresident in the United States, who have been allotted land in Oklahoma", etc. The provisos, however, authorize the leasing of the allotments of Kickapoo Indian "allottees" who are nonresidents of the United States, under certain conditions. The inference from these provisos is no doubt that the restrictions are not removed in respect to the allotted lands while such lands are held by the original allottee, whether he or she be a nonresident of the United States or not. This construction is not inconsistent with the body of the statute, since both provisos and the body of the statute are susceptible of a harmonious construction, and in order to attain this result it is only necessary to construe the words "inherited and otherwise" used in the body of the statute, as not including lands held by the allottee at the time of the passage of the Act by virtue of an "allotment." The statute has been so construed in *Johnson* v. *United States*, 283 Fed. 954, where the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Lewis, said (p. 956):

> * * * when the whole paragraph is read with a view of sustaining it in all its parts the word "otherwise", in the second line, seems to be in contradistinction to allotment, so that it was clearly intended that all restrictions as to sale and incumbrance of lands, inherited or otherwise acquired (except allotments of surviving allottees), were removed under the conditions named.

Had the allottee Wah-puck-we-che attempted to convey her allotment prior to the passage of the Act of 1906 the conveyance would have been absolutely null and void in conformity with the agreement with the Kickapoo Indians ratified and confirmed by the Act of March 3, 1893, c. 203, 27 Stat. 557, and in accordance with the provisions of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, under which the said allotment was made (R. 26).

Section 5 of the General Allotment Act, *supra*, provides in part as follows (24 Stat. 389):

> And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

Now, if we are correct in our construction of the Act of June 21, 1906, the residence in Mexico of the allottee, Wah-puck-we-che, at the date of the passage of the said Act and for many years thereafter

until the time of her death, did not operate to remove the restrictions upon the alienation of her allotment. These restrictions were extended by Executive Orders of February 27, 1919, and June 14, 1924, until the year 1934 (R. 27); and had the said allottee attempted to convey her allotted lands at any time "after" the passage of said Act of 1906 her conveyance would also have been absolutely null and void. On the other hand, the death of Wah-puck-we-che, the [illegible], did not operate to remove the restrictions, for the restrictions, as has been repeatedly held by this Court, are not personal to the allottee but run with the land. *Bowling* v. *United States,* 233 U.S. 528, 535; *United States* v. *Noble,* 237 U.S. 74, 80.

II

THE ACT OF JUNE 21, 1906, DID NOT OPERATE TO REMOVE RESTRICTIONS UPON THE ALIENATION OF THE INHERITED LANDS UNLESS THE HEIR WAS A NONRESIDENT OF THE UNITED STATES AT THE TIME OF THE ALLOTTEE'S DEATH, OR BECAME SUCH A NONRESIDENT OF THE UNITED STATES THEREAFTER

As the restrictions were never removed during the lifetime of the allottee, Wah-puck-we-che, but were still in force at the time of her death, they continued to remain in force and bound the heirs as effectively as they did the original allottee. *Ewert* v. *Bluejacket,* 259 U.S. 129, 134. See also *Bowling* v. *United States, supra,* and *United States* v. *Noble, supra.*

This being so, the conclusion is unavoidable that Wa-pe-com-e, the heir, could not alienate the land

during the restrictive period any more than the original allottee, Wah-puck-we-che, unless, of course, it should be held that Wa-pe-com-e's residence in Mexico prior to his mother's death was sufficient under the Act of June 21, 1906, to remove the original restrictions. It is the Government's contention that the Act of 1906 cannot be so construed.

To hold that the Act of 1906 operated to remove the restrictions under the circumstances of this case, we submit, would clearly do violence to the plain meaning of the language used. There is nothing in the record of this case to show that upon or after the death of the allottee, Wah-puck-we-che, the status of the land was changed. Wa-pe-com-e was the sole heir, and although he had lived in Mexico with his mother until about 1920, he had returned in that year to the United States and was a resident of the United States at the time of his mother's death in January 1929, and has continued to reside in the United States ever since. As a matter of law, Wa-pe-com-e did not become an heir, that is, he did not acquire any interest by inheritance, in the land, until his mother died, as "no living person can have an heir" (18 C.J. 862); and, being a resident of the United States at that time and thereafter, the statute could not operate in his case for the reason that he has not been a nonresident of the United States at any time since his mother's death.

A fair construction of the Act of 1906 would require, we submit, that the heir should be a nonresident of the United States either at the time the inheritance vests in him or thereafter. The fact that Wa-pe-com-e went to Mexico and resided there with his mother for many years and after the passage of the Act of 1906 cannot affect the status of the land, not at least so long as his mother lived, since it was only upon her death that he acquired any vested interest in the land by way of inheritance. As at that time and ever since he has resided in the United States, the Act cannot be said to apply. The land then continued to be, and was at the time of the attempted conveyance by Wa-pe-com-e to the respondent Reily, subject to the restrictions, as it had been before, with the result that such a conveyance was and is absolutely null and void.

The Circuit Court of Appeals did not discuss the legal questions involved, but said (R. 56) that the instant case was not substantially different from that of *United States* v. *Estill*, 62 F. (2d) 620, a case which had just been decided by the Circuit Court of Appeals. In the *Estill case*, however, both the District Court and the Circuit Court of Appeals found as a fact that the Indian heirs in question resided in Mexico not only after the passage of the Act of June 21, 1906, but also *after they had inherited the land in question*, that is to say, after the death of the allottee. The Government does not

question the correctness of the decision of the court below in the *Estill case* but contends that the two cases are distinguishable upon their facts. In the *Estill case* the inheritance had already vested when the Act of June 21, 1906, was passed, and the heirs were nonresidents of the United States on that date and thereafter. In the instant case the heir, Wa-pe-com-e was a resident of the United States at the time of his mother's death, that is to say, at the time the inheritance vested in him, and has continued to be such at all times thereafter. When properly read the statute removes the restrictions only when the inheritance has vested, and the heir is or becomes a nonresident of the United States at that time, or at any time thereafter. This construction of the statute is in harmony with the rule that doubtful legislation is to be construed in favor of the Indians. *Worcester* v. *Georgia*, 6 Pet. 515, 562; *United States* v. *Celestine*, 215 U.S. 278, 290. It is the only construction which would give to this statute any meaning consistent with general principles of law and the Indian policy of the United States.

When this statute is examined in the light of its history, as may be gathered from committee reports and the debates in Congress upon the same, the conclusion seems inevitable that the main purpose of Congress in enacting this legislation was merely to permit such of the Kickapoo Indians as had *permanently taken up their residence in Mex-*

ico to sell all the lands in Oklahoma, acquired by them from the Indians through inheritance, devise, gift, or otherwise, thus excluding from the operation of the Act the lands individually allotted to them, and in the meantime to allow the leasing of such allotted lands under governmental supervision. Unfortunately the language used by Congress to accomplish this purpose was not well chosen, making the intention obscure. The following quotations are taken from the debates in Congress while the bill, which subsequently became the Indian Appropriation Act of June 21, 1906, was under discussion in the Senate:

> Mr. LODGE. I should like to ask the Senator in charge of the bill why is it not just as well to strike out those provisos? The Department wants to get rid of these Indians, and all the Senators on the committee have said it is desirable to get rid of the Indians. Why is it well to hold them on by these leases? Why not leave it absolutely free and strike out those provisos?
>
> Mr. CLAPP. I do not think the committee would have any objection to striking them out. I think they were put in there rather as a suggestion.
>
> The VICE PRESIDENT. Does the Senator from Massachusetts move to strike out the provisos?
>
> Mr. LODGE. Yes; I move to strike out the two provisos.
>
> The VICE PRESIDENT. The amendment of the Senator from Massachusetts will be stated.

The SECRETARY. After the word "removed," in line 13, page 104, strike out the colon and insert a period, and strike out the remainder of the paragraph.

Mr. MCCUMBER. Mr. President, I shall have to object to that amendment to the amendment for reasons that appear plain to me. A number of these Indians are going over to Mexico. We do not always know exactly what influence is being brought to bear upon them in order to gain their consent to change their domicile. It is not always easy to ascertain whether or not an absence of a month or two months or six months or even a year amounts to a change of residence. No time is given, and it seems to me that it will be better to allow this restriction to remain until we become certain that the Indian has changed his residence. I greatly fear that the mere absence of an Indian will be taken as a basis for some designing person who wants his land to secure a deed. I hope the provisos will remain in the bill until we can give it further consideration.

* * * * *

Mr. LODGE. I withdraw the motion to strike out those provisos. (Cong. Rec., Vol. 40, Pt. 6, pp. 5790–5791.)

Under the circumstances the Act of June 21, 1906, requires judicial interpretation, and, in view of the rule referred to above that doubtful legislation should be construed in favor of the Indians, a

certain amount of latitude, we submit, should be allowed so as not to permit the obscurity and inaptness of the language used to entirely obliterate the actual intention of Congress in enacting this law, as indicated above. But, aside from this, when the Act itself is read, without the aid of any extrinsic evidence as to the actual intention of Congress, with the purpose of giving effect to all of its provisions, the construction contended for by the Government is the correct one, and should, we submit, be adopted.

III

THE REPEALING ACT OF FEBRUARY 17, 1933, C. 97, 47 STAT. 819, HAS NO APPLICATION TO THE CONTROVERSY INVOLVED IN THIS CASE

Respondent has called attention to the Act of Congress approved February 17, 1933, c. 97, 47 Stat. 819, contending that by repealing the statute here involved Congress has "recognized" that all "titles" such as the one claimed by him were valid under said statute. (See Respondent's brief objecting to granting writ of certiorari, p. 4.)

Such contention, we submit, is clearly untenable. The Act of February 17, 1933, *supra*, provides as follows (47 Stat. 819):

> That the paragraph relating to the sale and encumbrance of lands of the Kickapoo and affiliated Indians under the heading "Kickapoo" (34 Stat. L. 363) in the Act entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty

stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1907," approved June 21, 1906, as amended, is hereby repealed.

SEC. 2. All restrictions upon said lands, which were removed by operation of said Act are hereby reimposed for a period of ten years from the date of the approval of this Act on all of such lands as are still held or owned by the Indians: *Provided, however,* That valid encumbrances now resting against any of said lands shall not in any manner be affected by the provisions of this Act, but any of such lands so encumbered, if still owned by the Indians, shall, when such encumbrances have been removed, become subject to the provisions of this Act as fully and to the same extent as if such lands were now unencumbered: *Provided further,* That the President may, in his discretion, in accordance with existing law, further extend the period of restriction herein provided for.

A careful examination of the above provisions will disclose that the purpose and policy of the Act of 1933 is threefold, namely: (1) to repeal the Act of 1906 insofar as it relates to the sale and encumbrance of lands of the Kickapoo and affiliated Indians; (2) to reimpose all restrictions upon said lands, which were removed by the operation of said Act of 1906 for a period of ten years or longer, in the discretion of the President, on all of such lands as are still held or owned by the Indians; and (3)

to confirm "valid encumbrances" resting against any of said lands now held or owned by said Indians.

As to the repealing part of the Act, it is not seen by what process of reasoning or rule of construction the respondent has arrived at the conclusion that by such repeal Congress has "recognized" his pretended "title" to the land involved, since the effect of a repealing statute is to revive the law as it stood before the passage of the statute repealed, *United States* v. *Philbrick*, 120 U.S. 52; and in the instant case, under the former law, the deed of conveyance upon which respondent bases his title to the land involved would be absolutely null and void. (See *supra*, pp. 9–11.) As to the other parts of the Act, it is clear that they are not intended to validate or "recognize" conveyances not otherwise authorized by the Act of 1906, nor by legislation prior thereto, such as the purported conveyance here involved.

As stated above, the Act of 1933 merely confirms "valid encumbrances" resting against lands of Kickapoo and affiliated Indians *held or owned by them at the time when such statute was passed.*

Whether the Act of 1933 has any application to the instant case depends, we submit, upon whether or not the deed of conveyance in question is a "valid encumbrance" within the meaning and intent of said Act. We submit it is not.

Prior to the Act of 1906 neither the allottee, Wah-puck-we-che, nor her heir, Wa-pe-com-e, could have

alienated this land, and any deed that might have been executed by either of them would have been absolutely null and void. (See *supra*, pp. 9–11). As the deed of conveyance upon which the respondent bases its title to the land involved was executed by Wa-pe-com-e subsequent to the passage of the Act of 1906, the question of the validity of said deed obviously depends upon whether or not the said Act operated to remove the restrictions upon the land. If it did, then the said deed of conveyance is valid; otherwise not.

Generally speaking, however, that is the very question presented for decision in this case (*supra*, p. 2), and we see therefore no useful purpose in pursuing the discussion of this aspect of the matter any further. We desire to add, however, that there is nothing in the Act of 1933, nor in the Committee reports of both Houses of Congress relating to this legislation, which even remotely suggests any intention on the part of Congress to validate or "recognize" any pretended title to lands of Kickapoo Indians based on a deed such as the one here involved, which purports to be not merely an encumbrance resting against the land involved but an outright conveyance of the entire title thereto, not authorized by the Act of 1906 nor by pre-existing legislation relating to the lands of Kickapoo Indians, and which is, therefore, as already seen, absolutely null and void.

CONCLUSION

In view of the foregoing considerations, it is submitted that the decision and decree of the Circuit Court of Appeals should be reversed, with directions to the District Court to enter a decree for the Government declaring null and void the conveyance and the State court judgments in question and cancelling the same; quieting the title to the land in the plaintiff as trustee for the heir of the deceased allottee, Wah-puck-we-che, against the claims, demands, and pretensions of the defendant, F. H. Reily, and enjoining and restraining the said defendant, F. H. Reily, from setting up and asserting any right, title, or interest in the land involved, or interfering with the leasing and managing of, and from trespassing upon the same.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
GEORGE C. SWEENEY,
Assistant Attorney General.
PEDRO CAPÓ-RODRÍGUEZ,
Attorney.

SEPTEMBER 1933.

U.S. GOVERNMENT PRINTING OFFICE: 1933

NO. 900

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

F. H. REILY,
Respondent.

OBJECTION TO GRANTING WRIT OF CERTIORARI

The respondent presents herewith his objection to the granting of the writ prayed for by the petition.

The Circuit Court of Appeals decided this case in favor of the respondent upon the principles stated in the case of *Johnson* v. *United States,* 283 Fed. 954, cited by the petitioner. The allottee was a non-resident in the United States and died such non-resident, leaving her sole heir, Wa-pe-com-e. Wa-pe-com-e had another allotment, and upon the death of his mother sold the property to the respondent. Wa-pe-com-e and his mother were not residents in the United States when the Act of June 21, 1906, became a law. The decision of the Circuit Court, in the opinion of the respondent, clearly decided in the Johnson case that the land, upon descending to the grantor, was alienable. The Act seems to be too plain, and the Honorable Circuit Court of Appeals so held, for any doubt as to construction. The Act

provides that all restrictions as to sale and encumbrances of all lands inherited and otherwise of all adult Kickapoo Indians who have been allotted lands in Oklahoma, are hereby removed. All restrictions as to all Shawnee, Delaware, Caddo and Wichita Indians who have heretofore been, or are now known, as Indians of said tribes affiliated with said Kickapoo Indians, now or hereafter non-residents of the United States, who have been allotted lands in Oklahoma or the Indian Territory, were removed. The non-residence of the Kickapoo Indians was not a condition precedent to make him a qualified Indian. The non-residence, however, of the other tribes named, was a necessary qualification to make his lands unrestricted. There is nothing in the Johnson case, or the Johnson record which indicates that the grantor Indians were residents or non-residents in the United States.

The Honorable Circuit Court of Appeals did not appear to take the question seriously as contended for by the petitioner. All these matters were thoroughly briefed and argued in this case, and an unanimous opinion was handed down affirming the decision of the lower court.

It is contended that there is a difference between the case of the United States v. Estill and this case, in that the trial court found that I-nesh-kin and Nah-she-po-eth were adults and residing in the Republic of Mexico on the 21st day of June, 1906, and thereafter. The record, however, of that case is not before this Court, showing that the

grantors were residents of Oklahoma at the time the deeds were executed. Hence the Circuit Court of Appeals, having both records before them, found that the facts in both cases were substantially the same. If the court who examined these records stated that the facts were substantially the same in each case, this Honorable Court, in our opinion, will arrive at the conclusion they are correct in this statement. The Government does not question the correctness of the decision in the Estill case, and as that Court says the facts are substantially the same, it would seem proper that the decision in this case should not be questioned.

The respondent suggests to the Honorable Court, since the opinion in the Johnson case, much land has been sold of the same character, improvements made thereon, and a contrary decision now would entail untold hardships upon such purchasers and unsettle their titles and dispossess them from homes they have occupied and improved for many years.

On page eight of the record an untenable suggestion is made that this is a case of great importance to the administration of the statute involved. That advice has been given by the Department of the Interior that the decision of the Circuit Court of Appeals will affect the title to land now held or formerly held by a considerable number of Indians of the various tribes mentioned in the statute and that a serious tax proposition will be involved.

The Solicitor-General has overlooked the Act passed by the Congress and approved February 17, 1933, to which we call this Honorable Court's attention. The Act of June 21, 1906, is repealed insofar as this particular provision, under which this land was purchased, is concerned. Hence this decision would not become in its nature a public question.

We contend by the repealing of this Act the Congress of the United States has recognized that all of these titles, such as the one held by respondent, were valid under this Act, and that all encumbrances placed upon the land by Indians were valid, or the necessity of repealing the Act would not have existed, nor would it have been necessary to validate encumbrances on such lands as there has been no encumbrances placed upon such lands by non-resident Kickapoo Indians.

The respondent therefore respectfully submits that the petition for a writ of certiorari should be in all things denied and the same dismissed.

Respectfully submitted,

F. H. REILY, *Respondent,*
By MARK GOODE, *His Attorney.*

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NO. 31

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

F. H. REILY,
Respondent.

BRIEF FOR F. H. REILY, RESPONDENT

The respondent accepts, generally the statements set forth in the brief by petitioner, of all the facts which were involved in this cause, both in the District Court and the Circuit Court of Appeals, in which the construction of the Act of June 21, 1926, is involved.

This act was construed by the United States Circuit Court of Appeals in the case of *Johnson* v. *United States*, 283 Fed. 954, in an opinion written by Judge Robert E. Lewis, who was at that time a member of the United States Circuit Court of Appeals of the 8th Circuit. The United States contended this opinion upheld their contention in this case in the United States Circuit Court of Appeals in the following language:

> "That case in its effect sustains our contention as to the proper interpretation of this statute." (Quotation page 7 of brief filed in Circuit Court.)

However, Judge Robert E. Lewis wrote the opinion in

the instant case in the United States Circuit Court, for the 10th Circuit, which is reported in Federal Reporter, Volume 62 (2d), 621. Judge Lewis, we may conclude, had formerly the record before him in the case of *United States* v. *Estill,* reported in 62 Fed. (2d) 620. That he studied the record and the construction to be placed upon the Act in question and held that the Indian, Wa-pe-com-e, was authorized under said Act, to execute the deed in question and to convey the land.

The Act of June 21, 1906, insofar as it relates to Kickapoo Indians, reads as follows:

> "All restrictions as to sale and encumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, who have been allotted land in Oklahoma, or Indian Territory, are hereby removed. Provided, however, that all such Indian allottees who is a non-resident of the United States may lease his allotment without restriction for a period not exceeding five years; * * *"

The proviso therefore provides that any such Indian as named above, who is a non-resident, may lease his allotment without restriction. The clause of the statute reading as follows:

> "And of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been, or are now known as Indians of said tribe, affiliating with said Kickapoo Indians, now or hereafter non-resident in the United States* * *"

clearly refers to the latter Indians named, and not to Kickapoo Indians. In other words for the Shawnee, Delaware, etc., to have the right to sell or encumber lands inherited or otherwise, they must become as Indians of said tribe,

that is to say, Delaware, Caddo, etc., and they must affiliate with Kickapoo Indians who are now, or hereafter non-resident in the United States.

It is clear that the above is the meaning of the Act, and it would require a strained construction to give it any other meaning.

It is contended by the petitioner that all doubtful statutes are construed favorable to the Indians. In the first place, this is not a doubtful statute. This Court said in the case of *First National Bank of Detroit* v. *United States et al.*, 234 U. S. 246, 56 L. ed. 1298, in construing a statute removing restrictions of the sale of allotments of Indians:

> "Evidently this legislation contemplated in some measure the rights of others who might deal with the Indians and obviously was intended to enlarge the right to acquire as well as to part with land held in trust for the Indians."

So we say that the intent and purport of this Act was to permit Kickapoo Indians to sell or encumber lands acquired by inheritance and otherwise, as distinguished from their allotments, and who have received such allotments of land in Oklahoma, or Indian Territory. The portion of the Act referring to the other tribes of Indians, required a condition, to-wit, that they must affiliate with Kickapoo Indians who are now, or hereafter non-resident in the United States. This clearly does not apply to a Kickapoo Indian for there would be no reason in providing that a Kickapoo Indian would be required to affiliate with members of his own tribe even of his own family.

So all of that portion of the Act, after the words "Kickapoo Indians" and preceding the word "who," clearly does not refer to the Kickapoo Indians, but to the Indians of the other tribes mentioned therein.

Further on in the case just cited above, this Court said:

> "If Congress intended to remove restrictions only from those who had half white blood, or more, it would have inserted in the Act the words necessary to make that intention clear; that is, we deem this a case for the application of the often expressed consideration, aiding in interpretation, that if a given construction was intended it would have been easy for the legislative body to express it in apt terms."

So we say in this instant, if Congress intended to make it a condition precedent for the Kickapoo Indians to be a non-resident at the time he acquired the land by inheritance, or otherwise, it could have easily expressed it in apt terms.

The respondent cannot agree with the language in the Government's brief at page 14, where it says:

> "Unfortunately the language used by Congress to accomplish this purpose was not well chosen, making the intention obscure."

The respondent does not think the language chosen is obscure, or the intention of the Congree is not clear. Neither did the Circuit Court of Appeals seem to think so when they wrote the Johnson opinion and the Estill and Reily opinions. The Government did not bring the record up in the Estill case because the court said the heirs were adults and residing in the Republic of Mexico on the 21st day of June,

1906, and thereafter. They complain of the opinion of the Circuit Court in this case because Judge Lewis said:

> "Applying the Act of June 21, 1906, quoting the Estill case, to the facts of this case, which are not substantially different and the facts in *United States* v. *Estill, supra,* the decree appealed from should be affirmed."

The reason Judge Lewis said the facts were "not substantially different" was because the respondent had brought himself within the terms of the statute as interpreted in the Johnson and Estill cases, to-wit, that it was unnecessary for a Kickapoo Indian to be a non-resident at the time of the inheritance of the land.

Clearly Judge Lewis understood this and as the record showed that the allottee was living in Mexico at the time of the adoption of the Act, along with the heir, and as Wa-pe-com-e, the heir, was allotted land in Oklahoma, he therefore was a qualified Indian and had a right to sell and dispose of the land in question.

The Indians whose rights to sell were construed in the case of *Johnson* v. *United States, supra,* were not Kickapoos, but were absentee Shawnee Indians. In this case, Judge Lewis finds that the deceased ancestor was an absentee Shawnee allottee. That the grantor was his heir and conveyed his inherited interest in the ancestor's allotment. That such grantor was an absentee Shawnee Indian and had been allotted land in his own right and that they and their ancestors were affiliated with non-resident Kickapoo Indians.

This opinion shows that the provisions of the Act rela-

tive to the affiliation of Indians with non-resident Kickapoo Indians, means members of those other tribes named in the Act.

Effect of Construction of Act.

The Johnson case was handed down on September 11, 1922, and has been considered the law relative to the right of Kickapoo Indians to sell and dispose of their inherited lands from that time up until the date of the filing of the petition in this case in the lower court.

A large number of pieces of inherited land have been sold by the heirs, the lands have been improved and rendered for taxation, and held as homes by the purchasers from that time until now. The law stated in the Johnson case has become a rule of property in this jurisdiction and if this Honorable Court should hold otherwise the title to a large number of pieces of land would be unsettled, untold injuries would result and a great loss involved to those who, in good faith, paid valuable consideration for such lands, improved them, and have been residing upon them as their homes, without objection upon the part of the Government, and in many instances sold and resold by warranty deed. All without objection or interference upon the part of the Government and with their active acquiescence.

Effect of Judicial Construction.

Many terms of Congress have passed by since September 11, 1922, and since the rendition of the opinion in the case of Johnson vs. United States, and the Congress has

not seen fit to enact any legislation bearing upon the Act of June 21, 1906, until the Act of February 17, 1933.

The Indian Department, so far as respondent knows, has not even importuned the Congress to pass any such amendatory acts until February 17, 1933, but have allowed the same to stand with the construction placed upon the Act of June 21, 1906, by the United States Circuit Court of Appeals.

We say the rule therefore is:

> "Where a judicial construction has been placed upon the language of the statute for a long period of time, so that there has been abundant opportunity for the law making powers to give further expression to its will, the failure to do so, it has been declared, amounts to legislative approval and ratification of the construction placed upon the statute by the court" 25 R. C. L. 956 Ear. 212.

This same rule was stated in the case of *Douglass* v. *County of Pike,* 101 U. S. 687, in the following language:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contracted rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

So respondent says that by reason of the plain and unequivocal language of the statute under consideration and the judicial construction placed thereon over twenty years ago, that this construction becomes a part of the

statute and gave the heir a right to sell and encumber. It is notable no allegation of fraud is made by the Government in this entire transaction and the assumption would be that the Indian was treated with fairness and paid a just and reasonable price for his land, and there is nothing involved but the construction of the Act.

The petitioner's construction requires the court to hold that the modifying term, or definite language, "now or hereafter non-resident in the United States," modifies, or defines, the adult Kickapoo Indians first mentioned in the act, as well as the other named tribes, and this upon its face is an absurdity for putting the language in the form that the petitioner's construction requires, it would read as follows:

> "All restrictions as to sale and encumbrance of all lands inherited and otherwise, of all adult Kickapoo Indians, affiliating with said Kickapoo Indians now or hereafter non-resident in the United States, who have been allotted land in Oklahoma or Indian Territory, are hereby removed; * * *"

Plainly, there is no justification for holding that there was any intention, or reason for saying, that "now or hereafter a non-resident in the United States" applies to the adult Kickapoo Indians. This is clear from the fact that as to the Kickapoo Indians, its benefits are confined to the adult members of the tribe, while as to the Shawnees, Delawares, Caddos and Wichitas, no distinction is made between adults and minors, and this is made clear by the second proviso in making provision for leasing of the minor allottee's land the adult Kickapoo can't lease.

The Act, of course, is controlled by the conditions prevailing at the time it passed. It is manifest in reading this statute, and the others relating to the Kickapoo Indians, that all of the Kickapoo Indians were supposed to be in Mexico, or were planning to go there, and hence, there was no restriction except that they must be adults, and either inherited or purchased land, to come within its purview, but Congress saw fit to confine and narrow the provisions of the act as to the other tribes, and make it applicable only to those who went to Mexico, or affiliated with those who did go. In other words, it amounted to confining the act to the adult members of the Kickapoo tribe and the adopted members of the tribe coming from the Delawares, Caddos, Wichitas or Shawnees.

Answer to Government's Second Specification of Error.

The respondent says that the Government is wrong in its interpretation of the statute in question. Conceding that the italicized part of the statute, as set out on page 7, should be read together, omitting that part of the statute which is not italicized, it appears as follows:

> "All restrictions as to sale and encumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians now or hereafter non-resident in the United States who have been allotted lands in Oklahoma or Indian Territory, are hereby removed."

The Act means that all restrictions as to sale and encumbrance of such inherited lands, of either Kickapoos, Delawares, Caddos or other Indians named in the Act, who affiliate with Kickapoo Indians now—meaning at the time

of the adpotion of the Act—or hereafter—meaning in the future—non-resident in the United States, and who have allotted lands in Oklahoma, are removed. In other words, if the grantor, Wa-pe-com-e inherited this land, and there is no question about that, and he affiliated with Kickapoo Indians who are non-resident in the United States after June 21, 1906, and if he was allotted land in Oklahoma, he is a qualified Indian to sell.

The Act does not say where such Indian has to affiliate with such Kickapoo Indians. There is nothing in the Act to indicate that such heir has to affiliate with Kickapoo Indians who are temporarily in Oklahoma or have to affiliate with Indians in the Republic of Mexico, or any other location, but if he affiliates with Kickapoo Indians who are now, or hereafter non-resident, with the other conditions present, he is a qualified Indian.

This, we say, is the necessary construction of the Act, if the Act is taken as contended for by the Government, providing they are not permitted to separate a clause in the Act as they have attempted to do on page 7 of their brief. In other words, they desire to separate the sentence "affiliating with said Kickatoo Indians now or hereafter non-resident in the United States" by dividing it at the word "Indians" and thereby attempting to give the Act a strange interpretation not authorized by the terms of the Act.

Respondent says that when an Act is clear, plain and unequivocal in its language a court is not authorized to change its plain terms by any rules of construction or to

give it a different meaning than that conveyed by its plain language. Hence, respondent says that the Act means that all restrictions, as to sale and encumbrance of all lands inherited and otherwise of all adult Kickapoo Indians who have been allotted lands in Oklahoma, are removed. It does not depend upon any act of the Indian—the law removes the restriction. When the law removes it the Indian has a right to act the same as any other citizen of the United States and to sell and dispose of such land.

This Court, in stating the rule for construction of such a statute, said:

> "The first resort with a view to ascertaining the meaning of a statute, is to the language used; if that is plain there is an end to construction and the statute is to be taken to mean what it says. *Adams Exp. Co.* v. *Kentucky,* 238 U. S. 190."

Construction of Statute.

The Government in this case admits that the Circuit Court decided the Estill case correctly (pages 12-13 brief) and they do not question the correctness of that decision, but claim a distinction between the Estill case and this case and base it largely on the non-residence of the heirs. However, the Circuit Court did not make this distinction. The Government states that when the statute is properly read the restrictions are only removed when the inheritance was vested and the heir becomes a non-resident in the United States, at that time or any time thereafter.

In other words it is all dependent upon the act and conduct of the heir. This construction is not inferable

from the Act itself and the Government seeks to substantiate this theory by a colloquy which they say occurred between the Senators at the time the Act was passed. They further state that doubtful legislation is construed in favor of the Indian, citing *Wacester* v. *Georgia,* 6 Peters, 515, and *United States* v. *Celestine,* 215 U. S. 278.

The first case cited was decided at a time when the Government treated the Indians as a separate nation and respected their rights as such. Chief Justice Marshall was construing an Act of the State of Georgia which subjected to punishment white persons residing within the limits of the Cherokee Nation and authorized their arrest and their trial in a state court. This court held the Act repugnant to the Constitution, treaties and laws of the United States and can have no possible bearing upon the rule invoked.

The Celestine case cited was a criminal case deciding the jurisdiction of the Federal Court where a crime was committed by one Indian upon another and on an Indian Reservation. So clearly this is not applicable. Respondent feels that the rule stated in the case of First National Bank of Detroit vs. United States, cited above, is the correct rule. That is to say, that this Act contemplated the rights of others who deal with Indians and it intended to enlarge their rights to sell and encumber inherited land, regardless of their citizenship or location. Following this theory we quote from the case of *Re. Heff,* 197 U. S. 488:

> "Of late years a new policy has found expression in the legislation of Congress, * * * a policy which looks to the breaking up of tribal relations, the establishing of

> the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end."

It will thereby be seen that the policy of the Government is becoming more relaxed in its dealings with the Indian. There is nothing in the history of this Act, or in its apt expression, which justifies the statement made by the Government that it was the inevitable purpose of Congress to permit such of the Indians as had permanently taken up their residences in the Republic of Mexico, to sell inherited lands. Why, if this was the policy, not permit them to sell their allotted land? The Government further says that the Act, in the meantime, was to allow the leasing of such allotted lands under Government supervision.

This latter statement is in direct conflict with the proviso as such proviso provides that the Indian allottee who is a non-resident may lease his allotment without restriction for a period not exceeding five years. If the Government intended that the Indian should be a non-

resident at the time he sold his inherited land, it would have been as easy to put that provision in the purview of the Act as to provide in the proviso the condition that he must be a non-resident in order to lease his allotment.

The Act could have provided "that all restrictions as to sale and encumbrance of all lands inherited and otherwise of all adult Kickapoo Indians who are non-resident in the United States, and who have been allotted lands in Oklahoma, are hereby removed."

If this statute had read as above noted the Government's contention would be correct, but as it does not so read and as the language is clear, plain and apt there is no room for construction and we submit that the decision of the Honorable Circuit Court of Appeals should be affirmed.

MARK GOODE,
F. H. REILY,
Attorneys for Respondent.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1933.

The United States of America, Petitioner, *vs.* F. H. Reily.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 6, 1933.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This suit was brought by the United States to enforce its rights and regulations in respect of allotted Indian land held under a so-called trust patent. The land was allotted, and the trust patent issued, with the express restriction that the land should be inalienable for a designated period, which the President might extend, and that any alienation contrary to the restriction should be absolutely void.[1] After the allottee's death and during the period of restriction, as extended by the President, the heir conveyed part of the land to the defendant.

The defendant prevailed in both courts below; 62 F. (2d) 621, and the United States petitioned for certiorari, which this court granted.

It is settled, and is conceded, that a restriction on alienation such as is here shown is not personal to the allottee but runs with the land and operates upon the heir the same as upon the allottee.[2] So it is apparent the heir's conveyance was void, unless in some way the restriction was removed before the conveyance was made.

The real question is whether the restriction was removed by Congress by the Act of June 21, 1906,[3] which will be set forth later on.

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[1]Acts Feb. 8, 1887, c. 119, § 5, 24 Stat. 388; March 3, 1893, c. 203, Art. IV, 27 Stat. 557.

[2]Bowling *v.* United States, 233 U. S. 528, 535; United States *v.* Noble, 237 U. S. 74, 80.

[3]C. 3504, 34 Stat. 325, 363.

The material findings of the District Court stand unchallenged and are to the following effect: The allottee, a Kickapoo Indian woman, and her infant son were members of the Kickapoo tribe of Oklahoma whose lands were allotted in severalty among its members in 1894. Both were then living with the tribe in Oklahoma and each received an allotment from the tribal lands. In 1903 the mother, taking the son with her, moved into the Republic of Mexico and established a residence in a Mexican community or tribe of Kickapoos to be described later on. She continuously maintained that residence and affiliated with that tribe until 1929, when she died intestate, leaving the son as her only heir. The son resided in Mexico until 1920 and then gave up that residence and returned to the Kickapoo Reservation in Oklahoma. Continuously thereafter he made the latter place his residence and home. He was residing there in 1929 when his mother died, in 1930 when he made the conveyance to the defendant, and in 1931 when this suit was begun.

In turning to the Act of June 21, 1906, it will be helpful to have in mind the conditions existing when it was enacted. At one time the Kickapoos were a single tribe occupying a treaty reservation in Kansas;[4] but through dissensions and migrations they had come in 1906 to comprise three separate communities or tribes having distinct places of abode. One tribe was still located on the old treaty reservation in Kansas and had been given allotments there.[5] Another was located in the Republic of Mexico on a reservation set apart for them by that government. In the main this tribe comprised Kickapoos who had separated from the Kansas tribe and settled in Mexico, some in 1852 and others in 1863.[6] There were also later accessions as will appear presently. A third tribe was located in Oklahoma and chiefly comprised Kickapoos who had left the Mexican tribe and returned to the United States, mostly in 1873.[7] A reservation in Oklahoma (then the Indian Territory) was established for them by executive order

[4]Treaties of Oct. 24, 1832, 7 Stat. 391; May 18, 1854, 10 Stat. 1078.

[5]Treaty of June 28, 1862, 13 Stat. 623.

[6]Handbook of American Indians, Hodge, Vol. 1, pp. 684, 685; Art. X of Treaty of 1862 just cited; Annual Report of Commissioner of Indian Affairs 1872, title "Kansas", subtitle "Kickapoos".

[7]Annual Report Commissioner of Indian Affairs 1874, title "Kansas", subtitle "Kickapoos".

in 1883.[8] The lands in this reservation were allotted among the members of this tribe in 1894,[9] the allotment to which this suit relates being one which was made then. Some of the allottees on this reservation removed to Mexico and established a residence with the Mexican tribe; and some of the allottees of neighboring Oklahoma tribes, such as Shawnees, Delawares, Caddos and Wichitas, did likewise. Not infrequently allottees who had gone to the Mexican tribe gave up their residence there and returned to Oklahoma. The migration to and from the Mexican tribe, while intermittent, was continuing when the Act of June 21, 1906, was passed. The part of that act which is material here reads as follows:

"All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: *Provided further,* That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee."

In any view of the act its words are not happily chosen. They are wanting in clarity and lend themselves to ambiguity. Both administrative officers and courts have found need for resorting to interpretation and construction when applying the act.

In *Johnson* v. *United States,* 283 Fed. 594, many conveyances—some by original allottees and some by heirs of such allottees—were assailed by the United States as made in violation of the restriction on alienation, and the defendant relied upon the act as having removed the restriction. Because of the varying facts relating to the several conveyances the act was considered from different angles. The principal question, common to all of the conveyances, was whether the main provision and the two provisos were inconsistent and mutually destructive. The District Court had held that they were, and therefore that the act was ineffective.

[8]Kapler Indian Laws and Treaties, 2d Ed., Vol. 1, 844; Annual Report of Commissioner of Indian Affairs 1883, p. 45.

[9]Act March 3, 1893, c. 203, 27 Stat. 557.

But the Circuit Court of Appeals disapproved that view and, after observing that if reasonably possible the act should be so construed that the main provision and the provisos could stand together, came to the following conclusion:

"The purview discloses plainly and clearly a legislative intention to remove restrictions under given conditions; . . . when the whole paragraph is read with a view of sustaining it in all its parts the word 'otherwise,' in the second line, seems to be in contradistinction to allotment, so that it was clearly intended that all restrictions as to sale and incumbrance of lands, inherited or otherwise acquired (except allotments of surviving allottees), were removed under the conditions named."

In other words, that court construed the main provision removing restrictions under given conditions as not relating to lands acquired by direct personal allotment but only to those acquired in other ways, such as inheritance, devise, etc., and construed the provisos permitting limited leases as relating only to lands acquired by direct personal allotments. On that basis the court proceeded to determine whether the facts shown brought any of the conveyances within the conditions named. As to the conveyances described in eleven out of fifty-four counts the court found that the lands were inherited and the grantors were heirs who came within the classes and conditions fixed in the act. In that connection the court said:

"And the counts each allege that the deceased ancestor was an absentee Shawnee allottee, a member of the absentee Shawnee tribe of Indians, that the grantor was his heir and conveyed his inherited interest in his ancestor's allotment; and the stipulation shows that each grantor was an absentee Shawnee Indian and had been allotted lands in his own right. We think it also fairly inferable from the record that the grantors had been allotted lands in Oklahoma or Indian Territory, and that they and their ancestors were affiliated with nonresident Kickapoos."

On these findings the conveyances described in the eleven counts were held valid and the decree of the District Court as to them was reversed. Of the conveyances described in the other counts the court briefly said that the facts obtained from the record did not support the claim of a removal of restrictions, and so the decree of the District Court cancelling those conveyances was affirmed.

Both parties acquiesce in and place some reliance on that decision. It is pertinent in so far as it holds that the act of 1906

did not remove the restriction on alienation from an allotment during the life of the allottee. Under that holding, with which we are in accord, the allotment in question remained subject to the restriction throughout the life of the mother, the original allottee.

On other points the facts in the *Johnson* case and those in this are not alike. In that case none of the heir-grantors was a Kickapoo. All were absentee Shawnees affiliated with the Kickapoos in Mexico. Here the heir-grantor was a Kickapoo permanently residing with the Kickapoos in Oklahoma when he inherited from his mother and continuously thereafter.

The defendant insists that the act of 1906 makes a distinction between Kickapoos and Shawnees, etc., in that it removes the restriction on alienation as to the former regardless of their residence and as to the latter only where they reside outside the United States. No reason for making such a distinction is suggested; nor is any perceived by us. The relation of all these Indians to the United States was the same. All were emerging from the old Indian life—the Kickapoos not in advance of the others. Some of each of the designated tribes had migrated to Mexico and others of each were inclined to do so. It was this migration, accomplished and prospective, which led to the act. In short, the circumstances were such as to suggest that a line of distinction be drawn at residence in or out of the United States and not at membership in one or another of the designated tribes. This we think is what was intended. Although inartificially framed, the act taken as a whole comports with this view quite as well if not better than with the other, and due regard for the status and interests of the Indians affected, which always are to be considered in construing such laws,[10] requires that it be preferred and given effect. Therefore we conclude that the qualifying phrase "now or hereafter nonresident of the United States" applies to the Kickapoos as well as to the Shawnees, etc.

In *United States* v. *Estill*, 62 F. (2d) 620, the Circuit Court of Appeals applied the act as we construe it. That suit involved a conveyance by heirs of a Kickapoo who had received an allotment in the Oklahoma reservation in 1894 and had died in Mexico

[10]Jones *v.* Mehan, 175 U. S. 1, 10-11; Minnesota *v.* Hitchcock, 185 U. S. 373, 402; United States *v.* Celestine, 215 U. S. 278, 290; Choate *v.* Trapp, 224 U. S. 665, 675; Carpenter *v.* Shaw, 280 U. S. 363, 367.

in 1905. The heirs were Kickapoos who had received allotments in the same reservation in their own right. The court deemed their residence material and gave the matter particular attention. It said: "The lower court also found, and the proof sustains it, that I-nesh-kin and Nah-she-pe-eth [the heirs] 'were adults and residing in the Republic of Mexico on the twenty-first day of June, 1906, and thereafter'." The conveyance was made on a later date. Thus the heirs' inherited ownership and their residence in Mexico coincided before the conveyance was made. On the facts recited the court ruled that the case came within the act, and accordingly sustained the conveyance.

That court disposed of the present case in the belief that its facts "are not substantially different from the facts in *United States* v. *Estill*". Whether this belief was occasioned by some inadvertence does not appear. But the real fact shown by the evidence, found by the District Court, and not questioned by the defendant, is that the son, although at an earlier time a resident of Mexico, became an actual resident of the Kickapoo reservation in Oklahoma in 1920, and resided there continuously thereafter. The mother, the allottee, died in 1929. Then, and not before, the son became her heir and inherited the land. At no time with him did ownership of the land and nonresidence in the United States coincide. That he had been a nonresident for several years ending nine years before the mother died is not material. During that period he had no right in the land and the restriction was of no concern to him. When later on he inherited the land nonresidence, the chief condition on which the act made removal of the restriction to depend, was wanting. He was then and thereafter an Indian, resident in the United States among the people of his tribe, and holding the land under the restricted trust patent given to his mother. In our opinion such a situation was not within but outside the act, and the heir's conveyance to the defendant was void.

Apparently the act has been a source of much trouble,[11] and recently it has been repealed, but with saving clauses protecting rights lawfully acquired under it.[12]

Decree reversed.

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[11] Annual Reports Commissioner of Indian Affairs, 1906, title "Kickapoos"; 1911, title "Mexican Kickapoo Indians"; Senate Reports, Vol. A, No. 5, 60 Cong., 1st Sess.; Senate Report No. 710, 72 Cong., 1st Sess.; House Report No. 1901, 72 Cong., 2d Sess.

[12] Act February 17, 1933, c. 97, 47 Stat. 819.